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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 399

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA, APPELLANTS

vs.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED SEPTEMBER 15, 1942

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In Supreme Court of Pennsylvania

Docket entries

January Term, 1942—No. 173

(C. P. Lancaster County)

PENN DAIRIES, INC., PLAINTIFF

vs.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, DEFENDANT

Appeal of Plaintiff From the Judgment of the Superior Court at No. 311 October Term, 1941, Affirming the Order of the Court of Common Pleas of Lancaster County at Trust Book No. 34, Page 274

Same Record as No. 180, January Term, 1942

Harris C. Arnold, Frank E. Coho, Dep. Atty. Genl., Claude T. Reno, Atty. Genl. 4-9-42.

Gerald A. Gleeson, U. S. Atty., J. Barton Rettew, Jr., Asst. U. S. Atty., 4-15-42, for the United States, Intervenor.

Appeal from the Superior Court. Filed April 6, 1942, Eo die Certiorari exit. Returnable second Monday May 1942.

April 6, 1942. Record returned and filed.

April 18, 1942. Assignments of Error, filed.

March 12, 1942. Petition for allowance of appeal from the Superior Court to the Supreme Court, filed. Harris C. Arnold.

March 14, 1942. Acceptance of Service, filed.

March 19, 1942. Answer to Petition, filed. Frank E. Coho, Deputy Attorney General.

March 27, 1942. Allocatur allowed. By the Court.

April 15, 1942. Petition for Supersedeas, filed. Arnold & Bricker.

And now, April 15, 1942, upon consideration of the within petition and the accompanying consent of the appellee, it is ordered that the appeal from the Superior Court in the above-entitled case shall be and operate as a supersedeas. Wm. I. Schaffer, Chief Justice.

* * * (Excerpt from Order filed April 15, 1942, at No. 180 January Term, 1942) * * * and it is directed that said appeal be heard with case of Penn Dairies, Inc., vs. The Milk Control Commission of Pennsylvania, No. 173, January Term, 1942.

The United States is allowed to intervene in the appeal of Penn Dairies, No. 173, January Term, 1942. By the Court, Wm. I. Schaffer, Chief Justice.

May 11, 1942. Stipulation filed. (No Order made.)

May 11, 1942. Argued.

May 25, 1942. Judgments affirmed. Per Curiam.

2 June 3, 1942. Petition to retain the record filed. Gerald A. Gleeson, U. S. Attorney, J. Barton Rettew, Asst. U. S. Atty. Harris C. Arnold, for Penn Dairies.

And now, to wit, this 3rd day of June 1942, it is hereby ordered that on consideration of the foregoing petition the record in the case of Penn Dairies, Inc., Appellant, and The United States of America, Intervenor, Appellant v. The Milk Control Commission of the Commonwealth of Pennsylvania, being January Term, 1942, Nos. 173 and 180 shall be retained in the Prothonotary's office of the Supreme Court of Pennsylvania, Eastern District, Philadelphia, Pennsylvania, for a period of 60 days beyond the expiration date set forth in Rule 88 of this court. Wm. I. Schaffer, Chief Justice.

July 27, 1942. Petition for reargument filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

Eo die, Acceptance of Service petition for reargument, filed. Frank E. Coho, Deputy Attorney General.

July 27, 1942. Assignments of Error filed.

July 27, 1942. Petition for allowance of appeal to the Supreme Court of the United States, filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

July 27, 1942. Statement as to Jurisdiction filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

July 30, 1942. Answer to petition for appeal to the Supreme Court of the United States and waiver of notice, filed. Claude T. Reno, Attorney Genl. Frank E. Coho, Deputy Atty. General.

3 August 8, 1942. Reargument refused. Per. Curiam.

August 8, 1942, Petition for Supersedeas, filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

August 8, 1942, Order allowing appeal to the Supreme Court of the United States, received and filed as follows:

"And now, August 8, 1942, it is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above entitled case, as provided by law, and it is further ordered that the Prothonotary of the Supreme Court of Pennsylvania shall prepare a certified transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of

the United States, so that he shall have the same in said Court within forty days of this date.

And it is further ordered that security for costs on appeal and to act as a supersedeas be fixed in the sum of $500.00. Wm. I. Schaffer, Chief Justice of the Supreme Court of Pennsylvania.

August 8, 1942. Bond on appeal to the Supreme Court of the United States, filed, with Order as follows:

"August 8, 1942. The within Appeal Bond is hereby approved and ordered filed. Wm. I. Schaffer, Chief Justice."

4 And now, August 8th, 1942, upon consideration of the within petition, Appellee having waived notice and objection thereto, and appeal bond in the amount of $500.00 having been filed by Penn-Dairies, Inc., and approved, it is ordered that the appeal of the United States of America and Penn Dairies, Inc. to the Supreme Court of the United States from judgment of the Supreme Court of Pennsylvania shall be and operated as a supersedeas. Wm. I. Schaffer, Chief Justice of the Supreme Court of Pennsylvania.

August 11, 1942. Designation of parts of Record to be included in Transcript of Record, filed. Gerald A. Gleeson, United States Attorney Arnold & Bricker.

August 18, 1942. Citation and Acceptance of Service of Citation on behalf of the Milk Control Commission, filed.

August 18, 1942. Proofs of Service of Citation of Appeal and Designation of parts of the Record to be included in the transcript on Appeal to the Supreme Court of the United States, filed. Arnold & Bricker.

August 28, 1942. Statement against Jurisdiction of Supreme Court of the United States and motion to dismiss or affirm appeal, filed. Claude T. Reno, Attorney General, Frank E. Coho, Deputy Attorney General.

In Supreme Court of Pennsylvania

Docket entries

January Term, 1942—No. 180

(C. P. Lancaster)

PENN DAIRIES, INC., THE UNITED STATES OF AMERICA, INTERVENTOR, APPELLANT

vs.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Appeal of The United States of America from the judgment of the Superior Court, at No. 3 October Term, 1942, dismissing

Appeal from the Court Common Pleas of Lancaster County to Trust Book #34, page 274

Same record as No. 173, January Term, 1942

Harris C. Arnold. 4-15-42.

Frank E. Coho, Dep. Atty. Genl., Claude T. Reno, Atty. Genl. 4-24-42.

Gerald A. Gleeson, United States Attorney. J. Barton Rettew, Jr., Asst. U. S. Attorney.

Appeal from Superior Court. Filed April 15, 1942. Eo die Certiorari exit. Retble. 2d. Monday May 1942.

April 15, 1942. Record returned and filed.

April 17, 1942. Assignments of Error filed.

April 15, 1942. Petition for leave to appeal from the judgment of the Superior Court, and for leave to intervene, and to join in the appeal in Penn Dairies, Inc., vs. Milk Control Commission of the Commonwealth of Pennsylvania at No. 173 January Term, 1942, filed. Gerald A. Gleeson, United States Attorney, J. Barton Rettew, Jr., Asst. U. S. Attorney.

And now, April 15, 1942, on consideration of the within petition it is ordered and decreed as follows:

The United States of America is allowed to appeal from the judgment of the Superior Court; and it is directed that said appeal be heard with the case of Penn Dairies, Inc., vs. The Milk Control Commission of Pennsylvania, No. 173 January Term, 1942.

The United States is allowed to intervene in the appeal of Penn Dairies, No. 173, January Term, 1942. By the Court, Wm. I. Schaffer, Chief Justice.

May 11, 1942. Stipulation filed. (No Order made.)

May 11, 1942. Argued.

May 25, 1942. Judgments affirmed. Per Curiam.

6 June 3, 1942. Petition to retain the record, filed. Gerald A. Gleeson, U. S. Atty., J. Barton Rettew, Jr., Asst. U. S. Atty., Harris C. Arnold for Penn Dairies.

And now, to wit, this 3rd day of June 1942, it is hereby ordered that on consideration of the foregoing petition the record in the case of Penn Dairies, Inc., Appellant and The United States of America, Intervenor, Appellant, v. The Milk Control Commission of the Commonwealth of Pennsylvania, being January Term, 1942, Nos. 173 and 180, shall be retained in the Prothonotary's Office of the Supreme Court of Pennsylvania, Eastern District, Philadelphia, Pennsylvania, for a period of 60 days beyond the expiration date set forth in Rule 88 of this court. Wm. I. Schaffer, Chief Justice.

July 27, 1942. Petition for reargument filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

Eo die Acceptance of service of petition for reargument filed. Frank E. Coho, Deputy Attorney General.

July 27, 1942. Petition for allowance of appeal to the Supreme Court of the United States, filed. Gerald A. Gleeson. Arnold & Bricker.

July 27, 1942. Statement as to Jurisdiction filed. Gerald A. Gleeson, U. S. Atty. Arnold & Bricker.

July 30, 1942. Answer to petition for appeal to the Supreme Court of the United States and waiver of notice filed. Claude T. Reno, Attorney General. Frank E. Coho, Deputy Attorney General.

7 July 27, 1942. Assignments of Error filed.

August 8, 1942. Petition for Supersedeas, filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

August 8, 1942. Order allowing appeal to the Supreme Court of the United States, filed as follows:

And now, August 8, 1942, it is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above entitled case, as provided by law, and it is further ordered that the Prothonotary of the Supreme Court of Pennsylvania shall prepare a certified transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

And it is further ordered that security for costs on appeal and to act as a supersedeas be fixed in the sum of $500.00. Wm. I. Schaffer, Chief Justice of the Supreme Court of Pennsylvania.

August 8, 1942. Bond on appeal to the Supreme Court of the United States, filed with order as follows:

"August 8, 1942. The within Appeal Bond is hereby approved and ordered filed. Wm. I. Schaffer, Chief Justice."

8 And now August 8th, 1942, upon consideration of the within petition, Appellee having waived notice and objection thereto, and appeal bond in the amount of $500.00 having been filed by Penn-Dairies, Inc., and approved, it is ordered that the appeal of the United States of America and Penn Dairies, Inc., to the Supreme Court of the United States from judgment of the Supreme Court of Pennsylvania shall be and operate as a supersedeas. Wm. I. Schaffer, Chief Justice of the Supreme Court of Pennsylvania.

August 11, 1942. Designation of parts of Record to be included in Transcript of Record, filed. Gerald A. Gleeson, United States Attorney. Arnold & Bricker.

August 18, 1942. Citation and Acceptance of Service of Citation on behalf of the Milk Control Commission, filed.

August 18, 1942. Proofs of Service of Citation of Appeal and Designation of parts of the Record to be included in the transcript on Appeal to the Supreme Court of the United States, filed. Arnold & Bricker.

August 28, 1942. Statement against Jurisdiction of Supreme Court of the United States and motion to dismiss or affirm appeal, filed. Claude T. Reno, Attorney General, Frank E. Coho, Deputy Attorney General.

9 Before the Milk Control Commission of Pennsylvania

Docket entries

March 5, 1941. Citation to Penn Dairies, Inc. to show cause why its application for a milk dealer's license for the year May 1, 1941 to and including April 30, 1942, should not be refused, or the granting thereof suspended.

March 11, 1941. Answer of Penn Dairies, Inc. filed.

March 18, 1941. Hearing held.

March 25, 1941. Order of Commission refusing application of Penn Dairies for milk dealer's license for the year May 1, 1941 to April 30, 1942.

In Court of Common Pleas of Lancaster County

Docket entries

April 7, 1941. Appeal by Penn Dairies from order of the Milk Control Commission.

April 7, 1941. Appeal to operate as supersedeas allowed by the Court.

April 26, 1941. Answer to appeal filed.

10 June 9, 1941. Motion for leave to file suggestion of interest of United States in matter in litigation.

June 9, 1941. Suggestion of interest of the United States in the matter in litigation filed by leave of Court.

June 9, 1941. Order made by the Court.

June 16, 1941. Record from Milk Control Commission received and filed.

June 16, 1941. On argument list, argued c. a. v.

July 25, 1941. Opinion read and filed and appeal from special order of Milk Control Commission dated March 25, 1941, refusing Penn Dairies, Inc., a milk dealer's license, order is sustained. Schaeffer, Judge.

July 31, 1941. Petition for order of Supersedeas filed and allowed and bond in sum of $500.00 approved and filed.

July 31, 1941. Appeal to Superior Court filed.

July 31, 1941. Certiorari from Superior Court filed.

Before the Milk Control Commission of Pennsylvania

Citation

March 5, 1941

To the Above-Named Defendant [*Penn Dairies, Inc.*]

You are hereby notified that a hearing will be held at the offices of the Milk Control Commission of the Commonwealth of Pennsylvania, Third Floor, Telegraph Building, Harrisburg, Pennsylvania, on Thursday, March 6, 1941, at 10:00 o'clock a. m. Eastern Standard Time, at which time and place you are hereby required to appear with all books, records and papers relating to the following matters to show cause why the Milk Control Commission should not refuse to grant or suspend the granting
11 of a milk dealer's license to you for the year May 1, 1941, to April 30, 1942, inclusive.

You are particularly cited for and this hearing will concern itself with violations of the Milk Control Law of April 28, 1937, P. L. 417, and the rules, regulations and orders of the Milk Control Commission issued pursuant thereto, the following being a statement of the violations with which this hearing will be concerned:

1. The defendant, Penn Dairies, Inc., is a corporation organized under the laws of the Commonwealth of Pennsylvania, doing business as a milk dealer in several parts of the Commonwealth of Pennsylvania and having its principal place of business in Lancaster, Pennsylvania, at 572 North Queen Street, and at 623 Second Street.

2. The defendant, Penn Dairies, Inc., has applied to the Milk Control Commission of Pennsylvania for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive.

3. On or about February 1, 1941, the purchasing and contracting officer of the Quartermaster at Indiantown Gap, Pennsylvania, sent to the defendant Penn Dairies, Inc., at Lancaster, Pennsylvania, a standard government form of invitation for bids, Form No. 30, Invitation No. QM 517-41-14, accompanied by standard government form of bid No. 31, and standard government form of continuance, Schedule No. 36.

4. Said standard form No. 30 as issued by the purchasing and contracting officer read as follows:

12 "Standard Government Form of Invitation for Bids

(Supply Contract)

Invitation No. QM 517–41–14

February 1, 1941.

"Sealed Bids, in triplicate will be received in this office until the date and hour named in the accompanying schedules and then publicly opened, for furnishing the materials and supplies called for therein.

"Bids must be submitted upon the Standard Government Form of Bid (Standard Form No. 31), and in accordance with the Standard Government Instructions to Bidders (Standard Form No. 22) and any special instructions suplementary thereto.

"Envelopes containing bids must be sealed and marked on the upper left-hand corner with the name and address of the bidder and the date and hour of opening and adressed to the purchasing agency named below:

"Purchasing and Contracting Officer, Office of the Quartermaster, Indiantown Gap, Pennsylvania.

"Marked: Bid for Milk, Buttermilk and Ice Cream.

March 1 to June 30, 1941, requirements.

"To be opened: 10:00 a. m. Eastern Standard Time, February 15, 1941.

Special purchase conditions, attached to said invitation for bids, provided, in part, as follows:

13 "1. General: Bids are invited for supplies as specified in this invitation, all or any part thereof, to be delivered as specified, all transportations, switching or drayage charges to be prepaid by the contractor and supplies to be subject to final inspection and acceptance at destination.

. . . . . .

23 . . .

"Milk, Bread, & Ice Cream.—Deliveries of Milk, Bread, and Ice Cream will be made daily to Military Organization Barracks, Indiantown Gap, Pa., on days called for by the Quartermaster, or his authorized representative, and at such time as directed. It is understood and agreed that the milk bottles and all containers shall remain the property of the contractors and every possible precaution will be maintained to preserve same in the original state, but in the event of damage to these articles while in the possession of the Government, the Government will not be held respon-

sible for such damages, as the purchase in question is a purchase of contents only."

5. Thereafter and prior to 10:00 a. m., Eastern Standard Time, February 15, 1941, Penn Dairies, Inc., in accordance with said invitation for bids, offered by writing delivered to said purchasing and contracting officer, to sell to the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, 135,000 one quart bottles of fresh pasteurized milk at $0.079 per bottle, and 540,000 half pint bottles of fresh pas-
14 teurized milk at $0.0215 per bottle. The schedule for bid and the defendant's bid described 135,000 quarts of fresh milk, and the 540,000 half pints of fresh milk as items Nos. 1 and 3 respectively, in said bid, the respective descriptions in said invitation and bid reading as follows:

"Item No. 1—Milk, Fresh, Grade A, Pasteurized, 1 Qt. Bottles, W/Sanitary Protective Type Caps. Type 11 C-M-381B 135,000 Btl.

"Item No. 3—Milk, Fresh, Grade A, Pasteurized, ½ Pt. Bottles, W/Sanitary Protective Type Caps. Type 11 C-M-381B 540,000 Btl."

6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training, situate in the northwestern part of Lebanon County between state highway route No. 443 and state highway route No. 343 in the State of Pennsylvania, and is situate in Area No. 11 of Pennsylvania, as designated by the Milk Control Commission of Pennsylvania, being the State-Wide Milk Marketing Area.

7. Minimum wholesale prices to be charged by milk dealers for milk sold in bottles or other containers in Area No. 11, the State-Wide Milk Marketing Area, are established by Official General Order No. A-6 of the Milk Control Commission, as amended by Official General Order No. A-14, in Section 4, subdivision (b).

8. Grade A pasteurized milk, as described in the aforesaid invitation to bid, is equivalent to Grade B milk as described in Offi-
15 cial General Orders Nos. A-6 and A-14 of the Milk Control Commission and other price fixing orders of the Commission. The part of Section 4 (b) of Official General Order No. A-14, amending and superseding that portion of Official General Order No. A-6 that applies to the present case, reads as follows:

"(b) Minimum Wholesale Prices. Milk dealers to other milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals and institutions for consumption on the premises:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.145	$0.06	$0.035
Grade "B" Milk:			
Exceeding 4% B. F.	.105	.06	.035
Not Exceeding 4% B. F.	.095	.05	.035
Grade "B" Milk to Schools: Not Exceeding 4% B. F.			.027

The above price to schools includes service charges for ice, straws, or special boxes. If these services are not rendered, the above prices may be reduced by $0.0025 per half-pint.

9. The Milk Control Commission has treated Indiantown Gap Military Reservation as an educational institution or school thereby allowing the benefit of an interpretation of such official general orders Nos. A-6 and A-14 favorable to the application of the lowest minimum prices possible for milk sold to Indiantown Gap Military Reservation, and announced to all known interested parties, including the defendant, Penn Dairies, Inc., that the minimum prices to be charged by milk dealers for fresh pasteurized milk in half pints sold to the purchasing and contracting officer at Indiantown Gap shall be $0.025 per half pint of milk where Grade B milk as described in said official general orders is furnished and there are no special services of ice, straws or special boxes, as will appear by a copy of a notice sent to milk dealers interested in the aforesaid invitations for bids on February 4, 1941, a true and correct copy being hereto attached being made a part hereof and marked Exhibit "A."

10. On February 15, 1941, at 10:00 o'clock a. m., Eastern Standard Time, the aforesaid bid of the defendant Penn Dairies, Inc. as well as other bids submitted, were opened by the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, and thereafter the offer of the defendant, Penn Dairies, Inc. to sell 135,000 quarts of fresh pasteurized milk and 540,000 half pints of fresh pasteurized milk, as hereinbefore stated, was accepted and a contract thus entered into.

11. The defendant, Penn Dairies, Inc., in accordance with the said offer to sell and contract for, has delivered milk to several mess halls and other places at said Indiantown Gap Military Reservation.

12. The milk so delivered was received from milk producers in and near Lancaster County, Pennsylvania, by defendant, Penn Dairies, Inc., at its place of business at 623 Second Street, Lancaster, Pennsylvania, where it was weighed,

tested, processed, bottled, capped, crated and loaded on trucks of the defendant for delivery by employees of the defendant to said Indiantown Gap Military Reservation.

13. The prices at which the defendant, Penn Dairies, Inc., offered to sell and did sell milk to the purchasing and contracting officer at the office of the Quartermaster, Indiantown Gap, Pennsylvania, were $0.079 instead of $0.095 for quarts of fresh pasteurized milk in quart bottles, and $0.0215 instead of $0.025 for half pints, as respectively provided in subdivision B of Section 4 of Official General Order A–6, as amended by Official General Order A–14, and therefore said offer to sell and the sales thereof are in violation of Section 807 of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, and the application for Penn Dairies, Inc., for a milk dealer's license for the year May 1, 1941, to and including April 30, 1942, should be refused, or the granting of the application suspended under Section 404 (10) of the Milk Control Law.

This hearing is held by the Milk Control Commission pursuant to the authority vested in it by the Milk Control Law of April 28, 1937, P. L. 417.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,
By: EDWIN H. RIDGEWAY, *Secretary.*

Dated:

18

Exhibit "A" to citation

COMMONWEALTH OF PENNSYLVANIA
MILK CONTROL COMMISSION

HARRISBURG, PENNA., *February 4, 1941.*

To All Milk Dealers Interested In Submitting Bids to Furnish Milk to the United States Government at Indiantown Gap, Penna. During the Period from March 1 to June 30, 1941, Inclusive:

The United States Government is asking for bids to be submitted to the Purchasing and Contracting Officer, Office of the Quartermaster, Indiantown Gap, Lebanon County, Pennsylvania, on its requirements for milk and buttermilk for delivery at that point during the period from March 1 to June 30, 1941, inclusive. The opening date for these bids is 10:00 a. m., E. S. T., February 15, 1941, at Indiantown Gap, Pennsylvania.

Among the items included in the schedules accompanying the standard form of bid, Invitation No. qm517–41–14, bids are requested for the following milk items:

Item No. 1

135,000 quarts Milk, Fresh, Grade A, Pasteurized, 1 quart Bottles, with Sanitary Protective Type Caps. Type II (Federal Specifications C–M–381B).

Item No. 2 (Alternate)

135,000 quarts Milk, Fresh, Grade A, Pasteurized, 1 quart Fiber Containers, Nonreturnable. Type II (Federal Specifications C–M–381B).

Item No. 3

540,000 Half-Pints Milk, Fresh, Grade A, Pasteurized, ½ Pint Bottles, with Sanitary Protective Type Caps. Type II (Federal Specifications C–M–381B).

Item No. 4 (Alternate)

540,000 Half-Pints Milk, Fresh, Grade A, Pasteurized, ½ Pint Fiber Containers, Non-returnable. Type II (Federal Specification C–M–381B).

Item No. 5

5,760 quarts Buttermilk, Plain, Pasteurized, 1 quart Bottles. Type A (Federal Specifications C–B–816).

Item No. 6 (Alternate)

5,760 quarts Buttermilk, Plain, Pasteurized, 1 quart Fiber Containers, Non-returnable. Type A (Federal Specifications C–B–816).

The quantities for the above items are listed as the estimated quantities required for each month during the period from March 1, 1941, to June 30, 1941, inclusive.

For your information and guidance, we are enclosing herewith a copy of our Official General Order A–14, applicable to Area No. 11, the Statewide Milk Marketing Area, in which area Indiantown Gap, Pennsylvania, is located, and direct your attention to subparagraph (b), Section 4, of said Order, setting forth the minimum wholesale prices to be charged by or paid to milk dealers for Grade A milk, either raw or pasteurized; for Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content; and for Plain Buttermilk, sold in bottles or other containers, in said Area No. 11.

The Commission construes the Government Facility at Indiantown Gap, Pennsylvania, as a training camp or reservation, and as such, where milk is required in half-pint bottles or half-pint fibre containers, would be entitled to the special wholesale half-pint school prices of said Order No. A–14.

Where milk dealers propose to furnish Grade A milk, pasteurized Grade B milk, not exceeding 4.0% butterfat content, or Plain Buttermilk, meeting Federal Specifications, the following minimum unit prices should be considered in the preparation of their bids:

Product	Unit prices	
	Quarts	Half-pints
Grade A Milk, either raw or pasteurized	$0.115	[1] $0.035
Grade B Milk, either raw or pasteurized, not exceeding 4.0% Butterfat Content	.095	[1] .0275
Plain Buttermilk	.07	

[1] Includes service charges for ice, straws, or special boxes. If these services are not rendered, these prices may be reduced by $0.0025 per half-pint.

The Commission suggests that milk dealers acquaint themselves with Federal Specifications for milk, particularly C–M–381B.

Any purchases or sales of milk made or offers to buy or sell milk at prices below the prescribed minimum prices of effective Official General Orders of this Commission are construed as violations of the Milk Control Law.

21 The Milk Control Commission expects compliance with its orders, rules, and regulations, and will appreciate your cooperation in this matter.

COMMONWEALTH OF PENNSYLVANIA
MILK CONTROL COMMISSION,
EDWIN H. RIDGWAY, *Secretary.*

Before the Milk Control Commission

Answer of Penn Dairies, Inc. to citation

Filed March 11, 1941

Penn Dairies, Inc., the respondent in the above matter makes answer to the citation issued against it therein, as follows (the term "the commission" as used herein shall mean the Milk Control Commission of the Commonwealth of Pennsylvania, the complainant):

1. The averments of paragraph 1 are admitted.
2. The averments of paragraph 2 are admitted.

3. The averments of paragraph 3 are admitted.

4. The averments of paragraph 4 are admitted.

5. The averments of paragraph 5 are admitted.

6. The averments of paragraph 6 are admitted.

7. The averments of paragraph 7 are admitted but respondent denies that said order and price fixing is valid, for reasons hereinafter set forth.

8. Respondent admits the averments of the first sentence of paragraph 8 of the citation. Respondent admits that the part of Section 4 (b) of Official General Order No. A-14 which the commission seeks to apply to the present case, is as set forth in the remainder of said paragraph 8. Respondent denies that said portions of said order are legally applicable to the present case.

22 9. The averments of paragraph 9 are admitted.

10. The averments of paragraph 10 are admitted.

11. The averments of paragraph 11 are admitted.

12. The averments of paragraph 12 are admitted.

13. Respondent admits that it offered to sell and did sell to the purchasing and contracting officer of the United States at the office of the Quartermaster, Indiantown Gap, Pa., quart bottles of fresh pasteurized milk at $0.079 per quart, and half pint bottles at $0.0215 per bottle. Respondent admits that the order of the Commission which the Commission seeks to apply to said contract and to this case, purports to fix a minimum price of $0.095 per quart for such milk in quart bottles and $0.0250 per half pint for such milk in half pint bottles. Respondent, for reasons hereinafter set forth, denies that said order is applicable or legally applicable to said contract and this case, and therefore denies that its action is in violation of any valid or applicable law, order, or regulation and particularly denies the violation of Section 807 of the Milk Control Law of April 28, 1937, P. L. 417. Respondent avers that its application should be neither refused nor the granting thereof be suspended.

NEW MATTER

In further answer to said citation, the respondent avers as follows:

14. The Commission is without jurisdiction under the laws and constitution of Pennsylvania or under the laws and constitution of the United States to limit, regulate, control or interfere with the prices or other terms of a contract between the respondent and the United States or any agency or instrumen-
23 tality thereof, or to limit, regulate, control or interfere with any sale by the respondent to the United States or any agency or instrumentality thereof.

15. Insofar as any statute of Pennsylvania purports to confer on the Commission any power to do any act mentioned in the last preceding paragraph, such statute is in violation of the Constitution of the United States, and void.

16. Insofar as any order, ruling or regulation of the Commission purports, and insofar as the Commission attempts or asserts a right to do any act mentioned in paragraph No. 14 supra such order, ruling or regulation, and such action of the Commission is or would be in violation of the Constitution of the United States, and void.

17. As applied to the contract referred to in the citation in this case, and the sale of milk under said contract, the said order of the Commission and enforcement thereof with respect to said contract and sale would be and is arbitrary, unreasonable, discriminatory, illegal, unconstitutional, and void, and would deprive the respondent of property and its right to contract, without due process of law and in contravention of the law of the land.

18. Respondent particularly avers with respect to said Order of the Commission, in support of the foregoing allegations, as follows:

19. Said Order contains no schedule of minimum prices which are reasonably applicable to the said contract and sale, considering the size and quantities of milk involved, the method and place or area of delivery, and the reduced costs growing therefrom.

20. The said Order of the Commission was prepared and promulgated without contemplation of a contract and sale and delivery of milk in such large quantities to a single consumer, and the prices therein fixed are based on materially higher costs resulting from sales in much smaller amounts and under entirely different circumstances.

21. The said contract calls for delivery of greater quantities of milk per day and per month than any contract heretofore known by the Commission or by the respondent in Pennsylvania and the possibility of such sales was not considered in the preparation and promulgation of said Order.

22. All milk under said contract is delivered to a single consumer, the United States Army Quartermaster, Indiantown Gap, Pa., at a single army cantonment.

23. The cost to the respondent to supply the milk under said contract is materially less than costs of ordinary or even the largest quantity sales made in general commercial milk business by reason of quantity production in preparation and bottling, lower bottle losses, and lower delivery costs by reason of delivery of large quantities, in full truck loads to single destinations.

24. The prices which respondent would be required to charge under said order would be excessive, with respect to the respondent's costs.

25. The prices which respondent would be required to charge under said order are disproportionately high as compared with prices fixed by said order for wholesale sales of milk in ordinary quantities and under ordinary circumstances.

25 26. With respect to said contract and sale, said prices fixed by said Order bear no reasonable relation to the public interest or stabilization of the milk industry.

27. Therefore, respondent avers that it has not violated any valid and enforcible law, order, or regulation in entering into or in selling milk under said contract, and therefore its action thereunder provides no legal ground upon which it may be deprived of or refused a permit under the Milk Control Law.

PENN DAIRIES, INC.
By J. F. GARBER, *Treas.*

Before the Milk Control Commission

Reply to new matter contained in answer of respondent

The Milk Control Commission of the Commonwealth of Pennsylvania, complainant in the above matter, answers the new matters contained in the answer to the citation issued in the above case, as follows:

14. The Milk Control Commission of the Commonwealth of Pennsylvania, complainant in the above case, hereinafter sometimes referred to as the "Commission," denies that it is without jurisdiction under the laws and Constitution of Pennsylvania, or under the laws of the Constitution of the United States, to limit, regulate, control or interfere with the prices or other
26 terms of a contract between the respondent and the United States, or any agency or instrumentality thereof, or to limit, regulate, control, or interfere with any sale by the respondent to the United States, or any agency or instrumentality thereof, and in answer thereto avers that although the Milk Control Commission of Pennsylvania cannot limit, regulate, control or interfere with the United States or any agency or instrumentality thereof in the performance of its governmental functions, the Milk Control Commission of Pennsylvania, under its inherent police power, is authorized to regulate the milk industry of Pennsylvania to assure the inhabitants of Pennsylvania a constant and adequate supply of pure and wholesome milk, and such regulation includes the regulation of all milk dealers including

the respondent, regardless of who their customers may be, and that maintaining adequate prices to be charged by milk dealers for milk requires that all milk dealers be treated alike under the orders of the Commission so that a temporary advantage to one particular dealer as in this case will not result in creating unstable marketing conditions for milk dealers generally in Pennsylvania.

15. The Commission denies that insofar as any statute of Pennsylvania purports to confer on the Commission any power to do any act that the Commission contends under the last preceding paragraph it has a right to do such statute is in violation of the Constitution of the United States and void, and in answer thereto the Commission avers that the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, is within the police power of the Commonwealth of Pennsylvania, and the tenth amendment to the Constitution of the United States.

27 16. The Commission denies the averments of paragraph 16 of the answer to the citation, and in answere thereto avers that any order, ruling, or regulation of the Commission asserting a right to do any act that the Commission avers it can do in paragraph 14 above is in consonance with the Constitution of the United States because within the police power of the Commonwealth of Pennsylvania and the protection of the tenth amendment to the Constitution of the United States.

17. The Commission denies the averments of paragraph 17 of the answer to the citation, and in answer thereto avers that as applied to the contract referred to in the citation in this case and the sale of milk under said contract said order of the Commission and enforcement thereof with respect to said contract and sale are not arbitrary, unreasonable, discriminatory, illegal, unconstitutional, or void on their face, and that any unreasonableness of said order cannot be raised in this proceeding but must be raised in a proceeding before the Commission for revision or amendment of said order.

18-19. The Commission denies the allegations contained in paragraph 18 and 19 of the answer to the citation, and in answer thereto avers that said order does contain a schedule of minimum prices reasonably applicable to said contract and sale, as set forth in said citation, and that if a different minimum price should be established that matter must be determined by a petition to the Commission to revise or amend said order and action of the Commission thereon, including reasonable notice to all interested parties.

20. The Commission denies the allegations of paragraph
28 20 of the answer to the citation, and in answer thereto avers that said order of the Commission was prepared and pro-

mulgated in contemplation of all contracts and sales that would arise unless and until it was shown to the Commission that a lower minimum price could be fixed and an adequate supply of pure and wholesome milk for inhabitants of the Commonwealth of Pennsylvania be maintained thereunder. In further answer to paragraph 20 the Commission avers that the minimum prices fixed in said order are based on all the factors that the Commission must take into consideration in promulgating such minimum prices, and that any change in the minimum prices fixed in said order must be by a proceeding to revise or amend said order and cannot be used as a defense to a proceeding to punish the defendant for violation of said order.

21. The Commission admits that said contract calls for delivery of greater quantities of milk per day and per month than any contract heretofore brought to the attention of the Commission, but the Commission denies that said order was not intended to apply to such contracts as the contract in the present case, and further avers that said order of the Commission remains effective until action is brought by or before the Commission for the purpose of amending or revising said order.

22. The Commission admits the allegations of paragraph 22 of the answer to the citation.

23. The Commission neither admits nor denies the allegations of paragraph 23 of the answer to the citation, and avers that said facts are within the knowledge of the respondent and the Commission therefore demands proof of said facts. The Com-
29 mission denies that said facts even if proved are material to this case unless and until the respondent petitions the Commission to revise or amend said order and the Commission did revise or amend said order or refused to do so.

24. The Commission neither admits nor denies the allegations of paragraph 24 of the answer to the citation, and avers that said facts are within the exclusive knowledge of the respondent, and therefore demands proof of the same. The Commission denies that said facts, even if proved, are relevant in this proceeding and further avers that the prices fixed under said order are effective unless and until the respondent petitions the Commission to revise or amend said order and the Commission acts or refuses to act thereon.

25. The Commission denies the allegations of paragraph 25 of the answer to citation and in answer thereto avers that unless and until evidence is presented to the Commission in a proceeding to revise or amend said order showing that the prices fixed thereunder are disproportionately high as compared with prices fixed for wholesale sales of milk in ordinary quantities the prices fixed in said order must remain in full force and effect.

26. The Commission denies the allegations of paragraph 26 of the answer to the citation, and in answer thereto avers that with respect to said contract and sale said prices fixed by said order are reasonably necessary for the stabilization of the milk industry by maintaining minimum prices necessary for the payment to milk producers as fixed in said order and a necessary operating margin to assure adequate distribution of milk to consumers.

In further answer to said paragraph the Commission
30 avers that any question of the reasonableness of said order must be raised by the respondent in a proceeding to have said order amended or revised, and no such proceeding has been brought or even intimated by the respondent.

27. The Commission denies the allegations of paragraph 27 of the answer to the citation, and in answer thereto avers that for the reasons hereinbefore set forth the respondent has violated the Milk Control Law of April 28, 1937, P. L. 417, and Official General Order No. A-6 of the Milk Control Commission as amended by Official General Order A-14, and that the application of the respondent for a license to do business as a milk dealer should be refused.

MILK CONTROL COMMISSION OF THE
COMMONWEALTH OF PENNSYLVANIA.
By: JOHN M. MCKEE, *Chairman.*

(Affidavit omitted.)

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31 Before the Milk Control Commission

Hearing before the Commission

Tuesday, March 18, 1941—4:00 p. m. (Continued from 10:00 o'clock.)

Offices of the Milk Control Commission, Third Floor, Telegraph Building, Harrisburg, Pennsylvania.

Commissioner: Hon. John J. Snyder, Member, Presiding.

Appearances: For the Milk Control Commission—Hon. Frank E. Coho, Deputy Attorney General. For the Defendant—Harris C. Arnold, Esquire. Owen P. Bricker, Esquire. For the Pennsylvania Milk Dealers' Association, Intervener—Willis F. Daniels, Esquire.

No witnesses were called. The evidence consisting of certain exhibits offered and received in evidence and statements by counsel, as shown by the record.

Hearing convened at 4:00 P. M., Tuesday, March 18, 1941, being continued from 10:00 o'clock a. m., same day.

Mr. DANIELS. I wish to enter my appearance for the
32 Pennsylvania Milk Dealers' Association as an intervener in support of the position that bids to the Federal Government, specifically referring to Indiantown Gap, should be according to the Milk Control Commission orders set out in the orders for milk so furnished.

Statement of counsel

Case opened for the Commonwealth by Mr. Coho.

Mr. COHO. This is a citation proceeding brought against Penn Dairies, Inc., of Lancaster, Pennsylvania, to show cause why its application for a license to do business as a milk dealer for the year May 1, 1941, to and including April 30, 1942, should not be refused or the granting thereof suspended. Penn Dairies, Inc., has made certain offers to sell and is actually selling certain milk at less than minimum prices fixed by the Milk Control Commission. These sales are made to the purchasing and contracting officer at Indiantown Gap, Pennsylvania, for use by the United States Army. Penn Dairies, Inc., contends that the Milk Control Commission has no authority to regulate minimum prices charged by milk dealers where the sales are made to a branch of the United States Government. The Milk Control Commission contends that its regulations apply to all milk dealers alike and who the customers of the milk dealers are is not material to Commission action.

As Commonwealth's Exhibit No. 1, I offer in evidence a copy of the citation, receipt of the original of which is acknowledged in a separate paper.

Mr. SNYDER. It will be received.

(Copy of citation notice received in evidence as Commonwealth's Exhibit No. 1.)

33 Mr. COHO. As Commonwealth's Exhibit No. 2, I offer in evidence the answer of Penn Dairies to the citation, including certain new matter.

Mr. SNYDER. It will be received.

(Answer to citation received in evidence as Commonwealth's Exhibit No. 2.)

Mr. COHO. As Commonwealth's Exhibit No. 3, I offer in evidence reply to the new matter contained in the answer of the respondent.

Mr. SNYDER. It will be received.

(Reply to new matter contained in answer of respondent received in evidence as Commonwealth's Exhibit No. 3.)

Mr. COHO. As Commonwealth's Exhibit No. 4, I offer in evidence the acceptance of service of the citation and of the answer to new matter, as well as consent that the hearing be held at this time.

Mr. SNYDER. It will be received.

(Acceptance of service and consent to time of hearing received in evidence as Commonwealth's Exhibit No. 4.)

Mr. COHO. Finally, as Commonwealth's Exhibit No. 5, I offer in evidence a stipulation containing certain factual matter, and two orders of the Milk Control Commission relevant to this hearing.

Mr. SNYDER. It will be received.

(Stipulation, with copies of Orders Nos. A-14 and A-6 received in evidence as Commonwealth's Exhibit No. 5.)

Mr. COHO. At this time I wish to call the attention of the Commission to the evidentiary matters averred on behalf of the defendant. The defendant attempts to show two things as a
30 defense to this action. It claims that although it offered to sell and in fact did sell milk at less than the minimum prices fixed by the Milk Control Commission it did so to an instrumentality of the Federal Government and therefore as to such offer and sale it is not subject to the regulation by the Milk Control Commission. Further it contends that the order in question in this case is of a nature that is not subject to the orders of the Milk Control Commission invoked here. The defendant contends that because a large quantity of milk is involved in the offer to sell and sale in this case that the order of the Commission is not applicable. It is our contention that in this matter to punish the defendant for violation of orders of the Commission any question as to the reasonableness of the order, except something unreasonable on the face of the order, cannot be questioned here.

I call to the attention of the Commission that Penn Dairies, Inc., has not filed with the Commission any request to have the minimum prices fixed in Official General Orders Nos. A-6 and A-14 reduced. Indeed, when this matter was called to the attention of Penn Dairies, Inc., prior to this hearing, Penn Dairies did nothing about petitioning the Commission for any such reduction.

Before writing your order, I request that the Commission review its files of papers requesting action on its General Orders fixing prices, so that the Commission can in its findings of fact set forth what, if any, action Penn Dairies has taken in requesting a reduction of the aforesaid minimum prices. In this particular proceeding only the Commission and Penn Dairies, Inc., are involved. In a proceeding to revise minimum prices, however, all interested
35 parties are invited to be heard so that it cannot be said that in this proceeding a binding determination could be made regarding the orders in effect.

All milk dealers have an opportunity to bid on various contracts. No particular dealer should be allowed to have the advantage of refusing to follow the minimum prices fixed by the Commission

on the ground that the contract in question may be slightly different from contracts actually in force elsewhere at the time of the bidding. When an order of the Commission is promulgated all contracts, actual and prospective, are taken into consideration.

Mr. Snyder. If there is nothing further, the hearing is adjourned.

Stipulation of facts

(Commonwealth's Exhibit No. 5)

It is agreed between counsel for the Pennsylvania Milk Control Commission, complainant, and counsel for Penn Dairies, Inc., respondent, in the above entitled proceeding, that the matters hereinafter set forth in paragraphs 1, 2, and 3 hereof and all admissions in respondent's answer to citation, shall be treated as admitted facts upon the hearing in said proceeding, and in all subsequent steps in or arising out of each of two citation proceedings both bearing the above caption, whether before said Commission or any Court

1. Official General Order No. A-14 amending Official General Order No. A-6 with respect to the State-Wide Milk Marketing Area issued by the Milk Control Commission of the Commonwealth of Pennsylvania, on June 23, 1937 to be effective on
36 and after July 1, 1937, is attached hereto, marked "Exhibit A" and made a part hereof.

2. The contract between respondent and the United States referred to at length in the citation in this case (hereinafter called "the contract") calls for the largest quantity of milk to be delivered by a single seller to a single purchaser, or for delivery in quantity lots, known to the respondent or to the Commission.

3. No contract or delivery of milk comparable in size, or in circumstances of bottling and delivery, has heretofore been made in Pennsylvania.

It is further agreed that the statements in the following paragraphs shall be received in evidence as competent testimony on behalf of the respondent at the hearing in said proceedings and shall be considered as evidence of the respondent in all subsequent steps in or arising out of the above entitled proceedings, whether before said commission or any Court.

4. The Respondent's average bottle breakage and losses are one per cent. (1%) under said contract, and are three per cent. (3%) under ordinary sales conditions, the bottles under said contract being in more responsible hands, and are not scattered over large areas. The respondent's average bottle breakage and losses where milk is served under ordinary sales conditions is $0.00162 per quart bottle, and $0.00075 per half pint bottle. Under the said contract respondent's average bottle breakages and losses are $0.00054

per quart bottle and $0.00025 per half pint bottle—the breakage and losses being approximately three per cent. (3%) under ordinary sales conditions and one per cent. (1%) under said
37 contract. Therefore, by reason of those factors allowance should be made in calculating respondent's costs.

5. By reason of the large quantity of milk being delivered at one time to one place, a few trucks and drivers can handle the respondent's deliveries under this contract. Under ordinary circumstances delivery of the same quantity of milk would require a large number of trucks and drivers. The respondent's cost of delivering each bottle of milk under this contract (whether a quart or a half pint) is $0.0005 less than respondent's costs for delivery of bottled milk in ordinary sales. Therefore an allowance should be made by reason of that factor in calculating respondent's cost.

6. The cost to respondent of bottling a quart of milk, which includes the bottle washing and all various processes and plant operation, is $0.0045, and the cost of bottling a half pint is $0.00125.

7. The respondent's cost of the cap which is placed upon each bottle is $0.00125.

8. The profit which respondent would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry.

9. The margin of profit which the respondent will realize under the said contract is adequate for respondent's purposes and to maintain stability in the industry.

FRANK E. COLD,
Attorney for Complainant.
ARNOLD & BRICKER,
By HARRIS C. ARNOLD,
Attorney for Respondent.

38 *Exhibit "A" to stipulation of facts.*

Official General Order A-14

Commonwealth of Pennsylvania Milk Control Commission

OFFICIAL GENERAL ORDER NO. A-14

JUNE 23, 1937.

Amending Official General Order No. A-6; With Respect to the State-Wide Milk Marketing Area

By virtue of the authority vested in the Milk Control Commission of the Commonwealth of Pennsylvania by Act No. 105,

approved April 28, 1937, it is hereby ordered that Official General Order No. A-6 as heretofore issued by the Milk Control Commission be amended by this order, to be known as Official General Order No. A-14, effective July 1, 1937, at 12:01 a. m. This Order shall, and does hereby, amend said Official General Order No. A-6 with respect to Section 2; Section 3; Section 4, Paragraphs (a), (b), and (c); Section 5, Paragraph (b), (c, c-1) and (d); Section 7; and said Official General Order No. A-6 as amended hereby shall read as follows:

SECTION 1. Territorial Scope.—This Official General Order shall apply to the production, marketing and distribution of milk and designated milk products within the Commonwealth of Pennsylvania for Area 11, as hereinafter defined.

SECTION 2. Definitions.—As used in this Official General Order the following terms shall have the following meanings:

Area Number Eleven—State-Wide Milk Marketing Area—Consists of all areas in the Commonwealth of Pennsylvania which are not included in Areas One, Two, Three, Four, Five, Six, Seven, Eight, Mine, and Ten.

In the event that this Milk Marketing Area should overlap any other Milk Marketing Area in this state in such a manner as to cause conflict in prices, the higher price shall prevail.

New York Butter—Means the average price per pound of 92 score butter at wholesale in the New York Market, as reported by the United States Department of Agriculture for the month during which the milk is purchased.

Class 1 Milk—Includes all milk purchased, received or handled by a milk dealer and so marketed or disposed of as to be readily open to the supposition that it will find its ordinary utilization by human consumption as raw or pasteurized milk, homogenized milk, chocolate or other flavored milk, milk drink, or flavored drink. It includes all fluid milk purchased from a producer by a milk dealer and sold in fluid form by such milk dealer in bottles, and all milk sold by such milk dealer in bulk to stores, bakeries, hotels, restaurants, hospitals, schools, and institutions, irrespective of the use to which the purchaser from such milk dealer puts such milk. It also includes all milk received at a milk plant or receiving station in fluid form, in the absence of clear evidence that such milk is so accounted for as to fall into some other class.

Class 1A Milk—Includes all milk from which is derived sweet or sour cream to be sold for human consumption as sweet or sour cream.

Class 2 Milk—Includes all milk which is utilized, sold, distributed or disposed of other than as Class 1, Class 1A, or class 3 Milk.

Class 3 Milk—Includes all milk which is manufactured into butter, except, however, that milk manufactured into butter utilized in ice cream or other dairy products shall be included in Class 2 Milk.

The above classifications (Class 1, Class 1A, Class 2, and Class 3) shall apply to Milk Marketing Area 11: Provided, however, that in said Area, Class 2 milk as above defined may be subject to the following exceptions:

Class 4 Milk—Includes all milk utilized in the manufacture of milk chocolate, candy and confectioneries.

Class 5 Milk—Includes all milk utilized in the manufacture of Farmer's Pressed Cheese and Cream Cheese.

Class 6 Milk—Includes all milk utilized in the manufacture of American Cheese.

Skim Milk—Includes whole milk from which the cream has been separated and which does not contain more than one-half of one percent butterfat.

Unless otherwise clearly indicated herein, all terms in
41 this Official General Order shall have the meanings ascribed to them in Act No. 105, approved April 28, 1937.

SECTION 3. Minimum Prices to Producers.—The following shall be the minimum prices paid to producers or to a group of producers per hundred pounds of milk sold to milk dealers to be resold in Milk Marketing Area 11:

Class 1 Milk—$2.58.

Class 1A Milk—$2.20.

Class 2 Milk—Four times New York Butter, plus 20% of this amount, plus $0.15.

Class 3 Milk—Butterfat content of milk in pounds, multiplied by New York Butter, plus 10¢.

Milk purchased by milk dealers from producers or a group of producers to be manufactured into the specific products named in Classes 4, 5, and 6, at plants engaged in the manufacture of such products, shall be paid for in accordance with the classification of utilizing as defined for those particular classes. In the event that any such dealer manufactures or separates milk into any product not specifically named in Classes 4, 5, or 6, he shall pay for such milk upon the actual utilization as defined in Classes 1, 1A, 2, or 3.

Class 4 Milk—Four times New York Butter, plus 20% of this amount, plus $0.15 subject to the following premiums: A sanitation premium of $0.10 per hundred pounds shall be paid in the case of any producer whose stable, milkhouse and method of producing and handling milk meet the requirements of the Department of Health of the Commonwealth of Pennsylvania.

42 In addition, a production premium of $0.10 per hundred

pounds shall be paid to any producer whose average daily production equals or exceeds 1,000 pounds for the period covered by such payment. When the average daily production of such producer falls below 1,000 pounds, but not less than 500 pounds, the premium of $0.10 per hundred pounds may be reduced by $0.01 for each one hundred pounds of milk below 1,000 pounds. When the average daily production falls below 500 pounds no production premium shall be paid.

The above minimum prices for this Area shall be f. o. b. milk dealer's processing, bottling and/or manufacturing plant located nearest the producer's farm for milk of 4.0% butterfat content. With respect to milk in Classes 1, 1A, 2, and 4, there shall also be a butterfat differential of at least $0.02 per hundred pounds for each one-half of one-tenth percent added for milk testing above 4.0% butterfat content; and not more than $0.02 for each one-half of one-tenth percent butterfat shall be deducted for milk testing below 4.0% butterfat content.

The above prices for Class 4 Milk shall be f. o. b. manufacturing plant, however, if the milk is delivered to a branch station rather than the manufacturing plant, a maximum of $0.05 per hundred pounds may be deducted from the above price.

Class 5 Milk—Butterfat content of milk in pounds, multiplied by New York Butter, plus 10¢.

Class 6 Milk—For the month during which the milk is handled, the average of the weekly quotations per pounds of cheese with differentials as indicated at the following markets, or with differentials as indicated from such of these markets
43 as may issue quotations during the periods: Single Daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus $0.01 per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York. From the average price of cheese as determined from these quotations and differentials may be deducted $0.02 per pound of cheese allowance for making, and the price per 100 pounds of milk shall be computed according to the yield of cheese per 100 pounds of milk as follows:

B. F. Test	Cheese Yield	B. F. Test	Cheese Yield	B. F. Test	Cheese Yield
3.0%	8.30	3.9%	10.37	4.8%	12.44
3.1%	8.53	4.0%	10.60	4.9%	12.67
3.2%	8.76	4.1%	10.83	5.0%	12.90
3.3%	8.99	4.2%	11.06	5.1%	13.13
3.4%	9.22	4.3%	11.29	5.2%	13.36
3.5%	9.45	4.4%	11.52	5.3%	13.59
3.6%	9.68	4.5%	11.75	5.4%	13.82
3.7%	9.91	4.6%	11.98	5.5%	14.05
3.8%	10.14	4.7%	12.21		

The above minimum prices for Classes 5 and 6 milk shall be f. o. b. milk dealer's country receiving station or manufacturing plant nearest the producer's farm. If the milk dealer has no country receiving-station or manufacturing plant, then the prices shall be f. o. b. loading platform or shipping point nearest the producer's farm; in each case, the milk dealer shall pay the cost of transportation from such loading platform or shipping point to the destination.

44 SECTION 4. Minimum Retail and Wholesale Fluid Milk, Skim Milk, Buttermilk, Flavored Milk, and Milk Drink Prices.—The following shall be the minimum Retail and Wholesale prices charged by or paid to milk dealers for fluid milk, skim milk, buttermilk, flavored milk and milk drink sold in bottles or other containers in Area 11:

(a) Minimum Retail Prices.—Milk dealers, including stores, to consumers, except for consumption on premises where sold:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.13	$0.07	$0.05
Grade "B" Milk:			
Exceeding 4.0% B. F	.12	.07	.05
Not exceeding 4.0% B. F	.11	.06	.05
Cream Buttermilk, Chocolate Milk, and other flavored Milk or Milk Drink containing more than 0.5% Butterfat	Same as Grade "B" Milk Exceeding 4.0% Butterfat.		
Skim Milk	.08		
Buttermilk—Plain	.09	.06	

(One Gallon, Single Container, Single Delivery $0.30).

Any producer-distributor who distributes only milk which is produced entirely from his own herd may sell at the minimum prices quoted above irrespective of butterfat content. This provision shall not apply to cooperative producer associations selling milk directly to the consumer.

45 Minimum Retail Prices for Fluid Milk Sold at Farm In Consumers' Containers.—Any producer may sell at the farm, milk produced from his own herd and supplied in the purchaser's container, at $0.02 per quart below the minimum retail price fixed by this Order for Area 11.

(b) Minimum Wholesale Prices.—Milk dealers to other milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals and institutions for consumption on the premises:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.115	$0.06	$0.035
Grade "B" Milk:			
Exceeding 4.0% B. F	.105	.06	.035
Not exceeding 4.0% B. F	.095	.05	.035
Grade "B" Milk to Schools Not exceeding 4.0% B. F			.0275
Cream Buttermilk, Chocolate Milk and other flavored Milk or Milk Drink containing more than 0.5% Butterfat	(Same as Grade "B" Milk Exceeding 4.0% Butterfat.		
Skim Milk	.06		
Buttermilk—Plain	.07	.05	.03

(One Gallon, Single Container, Single Delivery, $0.25.)

The above prices To Schools include service charges for ice, straws, or special boxes. If these services are not rendered, the above prices may be reduced by $0.0025 per half-pint.

(c) Minimum Wholesale Prices.—Milk dealers to sub-dealers:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.0975	$0.055	$0.035
Grade "B" Milk:			
Exceeding 4.0% B. F	.0875	.055	.04
Not exceeding 4.0% B. F	.0775	.045	.03
Cream Buttermilk, Chocolate Milk and other flavored Milk or Milk Drink containing more than 0.5% Butterfat	(Same as Grade "B" Milk Exceeding 4.0% Butterfat.		
Skim Milk	.05		
Buttermilk—Plain	.06		

(One Gallon, Single Container, Single Delivery, $0.20.)

(d) Bulk Prices.—The following shall be the minimum Wholesale prices charged by or paid to milk dealers for fluid milk sold, In Bulk, to other milk dealers, including stores, bakeries, hotels, restaurants, schools, hospitals; and institutions, irrespective of the use to which they put such milk:

Quantity of the average daily delivery during month	Grade "A" milk	Grade "B" milk not exceeding 4.0% butterfat	Buttermilk	Skim milk for human consumption
	Price per quart			
Less than 10 quarts	Same as minimum wholesale bottled quart prices.			
10 to 39 quarts	$0.11	$0.085	$0.06	
40 to 199 quarts	.1075	.0825	.05	$0.04
200 to 599 quarts	.105	.08	.05	.02
600 to 999 quarts		.08	.05	.02
1,000 to 1,499 quarts		.08	.05	.02
1,500 quarts or over		.07	.05	.02

47 The Wholesale Bulk price for Chocolate Milk, Other Flavored Milk, Chocolate Drink or Other Flavored Milk Drink, or Cream Buttermilk, shall be the same as the above prices for milk.

The prices for Milk testing over 4.0% Butterfat shall be determined by adding $0.005 per Quart to the above prices.

Average Daily Delivery.—The average daily delivery during the month shall be computed by determining the number of days upon which deliveries are actually made under the terms of the sale, and dividing the total volume of milk delivered during the month by the number of such days.

SECTION 5. Minimum Retail and Wholesale Fluid Cream and Ice Cream Mix Prices:

The following shall be the minimum Retail and Wholesale prices charged by or paid to milk dealers for fluid cream sold in bottles or other containers and the minimum Wholesale prices charged by or paid to milk dealers for fluid cream and ice cream mix sold in bulk in Area 11:

(a) Minimum Retail Prices for Fluid Cream Sold In Bottles.—Milk dealers, including stores, to consumers, except for consumption on premises where sold:

Unit containers	Grade of cream (sweet or sour)		
	Light	Medium	Heavy
Quarts	$0.48	$0.63	$0.80
Pints	.26	.36	.46
Half-pints	.15	.20	.26
Quarter-pints	.10	.12	.15

48 (b) Minimum Wholesale Prices for Fluid Cream Sold In Bottles.—Milk dealers to any other milk dealers, including stores, hotels, restaurants, schools, hospitals and institutions:

Unit containers	Grade of cream (sweet or sour)		
	Light	Medium	Heavy
Quarts	$0.42	$0.56	$0.72
Pints	.23	.32	.41
Half-pints	.13	.17	.22
Quarter-pints	.09	.11	.13

(c) Minimum Wholesale Prices for Fluid Cream Sold In Bulk:

(c-1) Milk dealers to stores, hotels, restaurants, schools, hospitals, and institutions:

Quantity of the average daily delivery during month (quarts)	Grade of cream (sweet or sour)		
	Light	Medium	Heavy
1 to 10 price per quart	$0.42	$0.56	$0.72
10 to 39 price per quart	.36	.50	.63
40 to 199 price per quart	.34	.47	.59
200 to 399 price per quart	.33	.45	.56
400 to 599 price per quart	.32	.44	.55
600 or over price per quart	.31	.43	.55

Average Daily Delivery.—The average daily delivery during the month shall be computed by determining the number of days upon which deliveries are actually made under the terms of the sale, and dividing the total volume of milk delivered during the month by the number of such days.

(c-2) Milk dealers to milk dealers other than specified in paragraph c-1 of this Section:

For quantity of a single delivery	Grade of cream (sweet or sour)		
	Light	Medium	Heavy
1 to 4 cans per can of 40 quarts	$10.00	$14.00	$17.00

The cream prices set forth in paragraph c-1 of this Section are based upon New York Butter at $0.3525 per pound. For each $0.025 per pound increase or decrease in the New York Butter price above or below said price of $0.3525 per pound, these cream prices shall be increased or decreased accordingly on the basis of $0.01 per quart for Light Cream; $0.015 per quart for Medium Cream; and $0.02 per quart for Heavy Cream.

As used in this Official General Order, the term "Light Cream" means cream containing 20% butterfat; the term "Medium Cream" means cream containing 30% butterfat; and the term "Heavy Cream" means cream containing 40% butterfat. Any cream containing a greater percentage of butterfat shall be sold at minimum prices correspondingly greater than those fixed for the respective grades under this Section.

(d) Minimum Wholesale Prices for Ice Cream Mix (14% Butterfat; 38%-40% Total Solids) Sold In Bulk.—Milk dealers to any other milk dealers, including stores, hotels, restaurants, schools, hospitals and institutions:

FOR QUANTITY OF A SINGLE DELIVERY

Less than 10 gallons.....$1.05 per gallon
1 to 4 cans—Per can of 40 quarts..... 9.00 per can

50 There shall be a Butterfat Differential of $0.30 per can ($0.03 per gallon) added to the above prices for Ice Cream Mix for each 1% butterfat above 14%, and deducted for each 1% butterfat below 14%.

These prices are based upon New York Butter at $0.35 per pound. For each $0.01 per pound increase or decrease in the New York Butter price above or below said price of $0.55 per pound, these prices shall be increased or decreased accordingly on the basis of $0.13 per can ($0.013 per gallon) for 14% Butterfat Mix.

Application shall be made to the Commission for resale prices upon all grades of milk for which a price is not herein specifically prescribed.

SECTION 6. Constitutional Construction.—It is hereby declared to be the intention of the Commission that if this Order cannot take effect in its entirety because of the decision of any court holding illegal or unconstitutional any part hereof, the remaining provisions of the Order shall be given full force and effect as completely as if the part held illegal or unconstitutional had not been included herein, provided always that the parts held illegal or unconstitutional would not automatically void any other parts.

SECTION 7. Effective Date of This Order.—All milk delivered on and after June 2, 1937, shall be paid for at the prices prescribed in, and shall be otherwise governed by, Official General Order No. A–6; except, however, that the particular prices and provisions of this Order which amend Official General Order No. A–6 shall govern all milk delivered on and after July 1, 1937.

51 Milk delivered upon dates prior to June 2, 1937, shall be governed by the orders effective upon such dates.

PENNSYLVANIA MILK CONTROL COMMISSION,
HOWARD G. EISAMAN,
Chairman.
JOHN J. SNYDER,
ROBT. E. PATTISON, Jr.

Approved—The 24th day of June 1937.

GEORGE H. EARLE, *Governor.*

NOTE.—Official General Order No. A–6 which the foregoing order amended has no additional bearing on the case and therefore is not printed.

494093—42——3

Pennsylvania permit to United States for use of Indiantown Gap Military Reservation

(Commonwealth's Exhibit Offered and Admitted by Agreement in Court of Common Pleas.)

HARRISBURG, PENNSYLVANIA,
September 30, 1941.

The Commonwealth of Pennsylvania, by the Department of Property and Supplies, as Agent for the Department of Military Affairs, hereby gives permission for the United States, its troops, and troops of the National Guard being inducted into the Federal service, and their animals, vehicles, and equipment, at any and all times during the period commencing on or about September 30, 1940, and continuing for one (1) year, as under existing
52 Pennsylvania laws, this privilege cannot be granted for a period of more than one (1) year, temporarily, to enter, maneuver upon, pass over, and bivouac or camp upon the following-described premises and to use the water therein or thereon for drinking, cooking, and cleaning purposes, and the use of all existing facilities and for such additional construction as may be necessary to house and train such National Guard units as may be inducted into the Federal service. Such additional construction placed upon the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this permit, or lease if and when executed. It is understood that legislation is to be introduced in the Legislature granting the right to the Commonwealth to make a lease for such further time as may be mutually agreed upon by the parties. The said premises are described as follows:

Indiantown Gap Reservation, Indiantown Gap, Pennsylvania, consisting of 4,975 acres in East Hanover Township, Dauphin County, Pennsylvania, and 7,673¼ acres in Union and East Hanover Townships, Lebanon County, Pennsylvania, totalling approximately 12,638¼ acres.

This permit, for the above-described premises, is granted subject to the following reservations and exceptions:

a. (1) Dwelling houses now on the Reservation and hereafter to be erected by the Commonwealth of Pennsylvania, on the Reservation, to be used for the housing of employees of the Commonwealth of Pennsylvania who shall be subject to such rules and regulations as the Commanding Officer of the Can-
53 tonment or other competent military authority, may from time to time prescribe.

(2) Certain warehouses and barns on the Reservation now erected (Buildings Nos. D–1, 22, 1121, 1116, 1059, 1112, W–1, V–1,

X–2, U–1, 651, BB–1, AA–1, S–1, R–1, 1106, T–2, 1083, 1005, 1006, 1007, 1008A, 1008B, 1009, 1011, 1012, 1013, 1014, 1015, 1016, 1017, and 1018), or hereafter to be erected, to be used by the Commonwealth and as shall be mutually agreed to between the Commonwealth and the Federal Government.

b. The right to train an organization that may be organized to take the place of the Pennsylvania National Guard when it is in the field; also the Pennsylvania Motor Police. This training subject to mutual agreement between the Federal Government and the Commonwealth of Pennsylvania.

c. The right to erect and use an office building by the Commonwealth of Pennsylvania on the Reservation.

If desired by Commonwealth authorities, utility services such as electric light and power, heat, water, etc., will be furnished upon a reimbursement basis, by the Federal Government to dwellings and other buildings on the Indiantown Gap Reservation which have been exempted from War Department control by this permit, or to such buildings that may be hereafter erected by the Commonwealth of Pennsylvania on the Reservation. The cost of furnishing these services, as determined by the Commanding Officer of the Cantonment, will be reimbursed to the War Department either by the Commonwealth of Pennsylvania or the occupants of the dwellings.

34 It is understood that any claim for damage arising out of the use of said property under this permit shall be in writing, under oath, and shall contain a detailed statement of the condition of the premises, enumerating the loss or damage alleged and the estimated amount. Such claim shall be filed in triplicate within 240 hours after the termination of the use herein granted, with _____, Rents, and Claims Officer at _____, for adjustment or for settlement as provided by law and regulations.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PROPERTY AND SUPPLIES.
By ROGER W. ROWLAND, *Secretary of the Department of Property and Supplies, as Agent for the Department of Military Affairs.*

Witness: Louise Lynn.

Now, Feb. 21, 1941, the above temporary permit is approved.

ARTHUR H. JAMES, *Governor.*

Approved as to form.

ROBERT E. SCRAGG,
Deputy Attorney General.

55 **Before the Milk Control Commission**

Findings of fact

March 25, 1941

On March 5, 1941, a citation was directed against the respondent, Penn Dairies, Inc., requiring it to show cause why its application for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive, should not be refused for offering to sell and selling milk at less than minimum prices fixed by the Milk Control Commission. The alleged offer and sale were to the purchasing and contracting officer at Indiantown Gap, Pennsylvania, a United States Military Reservation. The respondent filed an answer to the citation, admitting the material allegations of the citation, but claiming that the offer and sale were not in violation of the Milk Control Law for two reasons: (1) that the offer and sale having been made to the United States, the respondent did not have to observe the orders of the Pennsylvania Milk Control Commission, and (2) that the order was not applicable to this transaction because the minimum price was too high. A hearing was held before the Milk Control Commission on March 18, 1941, at which time certain testimony was received.

From the pleadings and testimony before it, the Milk Control Commission makes the following findings of fact:

1. The defendant, Penn Dairies, Inc., is a corporation organized under the laws of the Commonwealth of Pennsylvania, doing business as a milk dealer in several parts of the Commonwealth of Pennsylvania and having its principal place of business in Lancaster, Pennsylvania, at 572 North Queen Street, and at 623 Second Street.

56 2. The defendant, Penn Dairies, Inc., has applied to the Milk Control Commission of Pennsylvania for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive.

3. On or about February 1, 1941, the purchasing and contracting officer of the Quartermaster at Indiantown Gap, Pennsylvania, sent to the defendant Penn Dairies, Inc., at Lancaster, Pennsylvania, a standard government form of invitation for bids, Form No. 30, Invitation No. QM 517-41-14, accompanied by standard government form of bid No. 31, and standard government form of continuance, Schedule No. 36.

4. Said standard form No. 30 as issued by the purchasing and contracting officer read as follows:

"STANDARD GOVERNMENT FORM OF INVITATION FOR BIDS

(Supply Contract)

Invitation No. QM 517-41-14

February 1, 1941.

"Sealed bids in triplicate will be received in this office until the date and hour named in the accompanying schedules and then publicly opened, for furnishing the materials and supplies called for therein.

"Bids must be submitted upon the Standard Government Form of Bid (Standard Form No. 31), and in accordance with the Standard Government Instructions to Bidders (Standard Form No. 22) and any special instructions supplementary thereto.

"Envelopes containing bids must be sealed and marked
57 on the upper left-hand corner with the name and address of the bidder and the date and hour of opening, and addressed to the purchasing agency named below:

"PURCHASING AND CONTRACTING OFFICER,
Office of the Quartermaster,
Indiantown Gap, Pennsylvania.

"Marked: Bid for Milk, Buttermilk, and Ice Cream. March 1 to June 30, 1941, requirements.

"To be opened: 10:00 a. m. Eastern Standard Time, February 15, 1941.

"Special purchase conditions, attached to said invitation for bids, provided, in part, as follows:

"1. *General.*—Bids are invited for supplies as specified in this invitation, all or any part thereof, to be delivered as specified, all transportations, switching or drayage charges to be prepaid by the contractor and supplies to be subject to final inspection and acceptance at destination.

"23. • • •

"*Milk, Bread & Ice Cream.*—Deliveries of Milk, Bread, and Ice Cream will be made daily to Military Organization Barracks, Indiantown Gap, Pa., on days called for by the Quartermaster, or his authorized representative, and at such time as directed. It is understood and agreed that the milk bottles and all containers shall remain the property of the contractors and every possible precaution will be maintained to preserve same in the original
58 state, but in the event of damage to these articles while in the possession of the Government, the Government will not be held responsible for such damages, as the purchase in question is a purchase of contents only."

5. Thereafter and prior to 10:00 a. m., Eastern Standard Time, February 15, 1941, Penn Dairies, Inc., in accordance with said invitation for bids, offered by writing delivered to said purchasing and contracting officer, to sell to the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, 135,000 one-quart bottles of fresh pasteurized milk at $0.079 per bottle, and 540,000 half-pint bottles of fresh pasteurized milk at $0.0215 per bottle. The schedule for bid and the defendant's bid described 135,000 quarts of fresh milk and the 540,000 half pints of fresh milk as items Nos. 1 and 3 respectively, in said bid, the respective descriptions in said invitation and bid reading as follows:

"Item No. 1—Milk, Fresh, Grade A, Pasteurized, 1 Qt. Bottles, W Sanitary Protective Type Caps. Type 11 C–M–381B 135,000 Btl.

"Item No. 3—Milk, Fresh, Grade A, Pasteurized, ½ Pt. Bottles, W Sanitary Protective Type Caps. Type 11 C–M–381B 540,000 Btl."

6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training, situate in the northwestern part of Lebanon County between state highway route No. 443 and State highway route No. 343, in the State of Pennsylvania, and is situate in Area No. 11 of Pennsylvania, as designated by the Milk Control Commission of Pennsylvania, being the State-Wide Milk Marketing Area.

59 7. Minimum wholesale prices to be charged by milk dealers for milk sold in bottles or other containers in Area No. 11, the State-Wide Milk Marketing Area, are established by Official General Order No. A–6 of the Milk Control Commission, as amended by Official General Order No. A–14, in Section 4, Subdivision (b).

8. Grade A pasteurized milk, as described in the aforesaid invitation to bid, is equivalent to Grade B milk as described in Official General Orders Nos. A–6 and A–14 of the Milk Control Commission and other price-fixing orders of the Commission. The part of Section 4 (b) of Official General Order No. A–14, amending and superseding that portion of Official General Order No. A–6 that applies to the present case reads as follows:

"(b) Minimum Wholesale Prices.—Milk dealers to other milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals, and institutions for consumption on the premises:

Product—Grade "A" milk; grade "B" milk	Unit price		
	Quart	Pint	Half-pint
Exceeding 4% B. F.	$0.115	$0.06	$0.035
Not exceeding 4% B. F.	.105	.06	.035
Grade "B" milk to schools, not exceeding 4% B. F.	.095	.05	.035
			.0275

The above price to schools include service charges for
60 ice, straws, or special boxes. If these services are not rendered, the above prices may be reduced by $0.0025 per half-pint.

9. The Milk Control Commission has treated Indiantown Gap Military Reservation as an educational institution or school thereby allowing the benefit of an interpretation of such official general orders Nos. A-6 and A-14 favorable to the application of the lowest minimum prices possible for milk sold to Indiantown Gap Military Reservation, and announced to all known interested parties, including the defendant, Penn Dairies, Inc., that the minimum prices to be charged by milk dealers for fresh pasteurized milk in half pints sold to the purchasing and contracting officer at Indiantown Gap shall be $0.025 per half pint of milk where Grade B milk as described in said official general orders is furnished and there are no special services of ice, straws or special boxes.

10. On February 15, 1941, at 10:00 o'clock a. m., Eastern Standard Time, the aforesaid bid of the defendant Penn Dairies, Inc., as well as other bids submitted, were opened by the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, and thereafter the offer of the defendant, Penn Dairies, Inc., to sell 135,000 quarts of fresh pasteurized milk and 540,000 half pints of fresh pasteurized milk, as hereinbefore stated, was accepted and a contract thus entered into.

11. The defendant, Penn Dairies, Inc., in accordance with the said offer to sell and contract for, has delivered milk to several mess halls and other places at said Indiantown Gap Military Reservation.

61 12. The milk so delivered was received from milk producers in and near Lancaster County, Pennsylvania, by defendant, Penn Dairies, Inc., at its place of business at 623 Second Street, Lancaster, Pennsylvania, where it was weighed, tested, processed, bottled, capped, crated, and loaded on trucks of

the defendant for delivery by employees of the defendant to said Indiantown Gap Military Reservation.

13. The prices at which the defendant, Penn Dairies, Inc., offered to sell and did sell milk to the purchasing and contracting officer at the office of the Quartermaster, Indiantown Gap, Pennsylvania, were $0.079 instead of $0.095 for quarts of fresh pasteurized milk in quart bottles, and $0.0215 instead of $0.025 for half pints, as respectively provided in subdivision B of Section 4 of Official General Order A-6, as amended by Official General Order A-14, and therefore said offer to sell and the sales thereof are in violation of Section 807 of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, and the application for Penn Dairies, Inc., for a milk dealer's license for the year May 1, 1941, to and including April 30, 1942, should be refused under Section 404 (10) of the Milk Control Law.

14. The Milk Control Commission finds that the testimony on behalf of the respondent does not show that Official General Order No. A-6, as amended by Official General Order No. A-14, is inapplicable to the facts of this case or invalid.

15. The respondent, Penn Dairies, Inc., did not prior to the issuance of this citation and has not since then filed with the Milk Control Commission any request for any amendment or revision to Official General Order No. A-6, as amended
62 by Official General Order No. A-14. The Milk Control Commission has not received any such request from any other milk dealer affected by said orders.

DISCUSSION

The first legal proposition submitted to the Commission by the respondent is that because it sells milk under the contract in question to an instrumentality of the United States, the orders of the Milk Control Commission are not applicable. This contention cannot be sustained.

In the case of Commonwealth v. Rohrer, 37 D. & C. 410, 421, in an opinion by Judge Schaeffer, the Court of Quarter Sessions of Lancaster County held that a milk dealer who sells milk to the United States Veterans Hospital must do so at the minimum prices prescribed by the Commission. The facts in that case were almost identical in the present case before the Commission. There appear to be only two other cases directly in point. These are Patterson Milk and Cream Company, Inc., v. Milk Control Board, 118 N. J. L. 383, 192 Atl. 838, and Milk Control Board v. Gosselin's Dairy, Inc., 16 N. E. (2d) 641, 644 (Mass. 1938). The law is so well discussed in the opinion by Judge Schaeffer that no further discussion will be made here. It is sufficient to

say that the regulations of the Milk Control Commission are an exercise of the police power to which the respondent milk dealer is subject. There is no attempt by the Commission to regulate the actions of United States officers upon United States territory.

The second legal defense that the respondent interposes is that the order of the Milk Control Commission in this particular case is not reasonable.

63 The respondent milk dealer has not requested a hearing pursuant to Article VIII of the Milk Control Law for the purpose of revising Official General Order No. A-6, as amended by Official General Order No. A-14. The present hearing is one concerning only the Milk Control Commission and the respondent dealer. A hearing to revise or amend a price order is one in which all interested parties are entitled to due notice. It would be manifestly unfair for the Milk Control Commission to say without allowing other interested parties to be heard, that this particular order is unreasonably high. The respondent cannot disregard an order of the Milk Control Commission and attempt to bring out facts that show unreasonableness of the order in a proceeding of this kind. This can only be done by an appeal from the price order itself or by petition to have a price order amended or revised.

Those milk dealers who rely upon the validity of a price order and govern their bids and sales accordingly would be the victims of uncertainty if the respondent were able to disregard the orders of the Commission and acquire a contract at other than lawful prices by reason of alleged unreasonablenes of the orders.

The Superior Court of Pennsylvania so held in the case of Commonwealth v. Ziegler Dairy Company, 139 Pa. Superior Ct. 224, 11 Atl. (2d) 669, in which President Judge Keller discussed this matter fully.

64 Before the Milk Control Commission

Order of the Commission

March 25, 1941

And now, this 25th day of March A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive, is refused for the reasons above stated.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,
JOHN M. McKEE, *Chairman*,
JOHN J. SNYDER, *Member*.

In the Court of Common Pleas of Lancaster County

Appeal petition

April 7, 1941

To the Honorable the Judges of said Court:

Penn Dairies, Inc., a Pennsylvania Corporation aggrieved by a special order of the Milk Control Commission directed against it, brings this its appeal therefrom and respectfully represents.

1. That Penn Dairies, Inc. (hereinafter called the appellant) is a corporation incorporated under the laws of the Commonwealth of Pennsylvania and has its office and principal place of business at the corner of North Queen and Frederick Streets in the City of Lancaster, Pa.

2. That Penn Dairies, Inc. is engaged in the milk business in the Commonwealth of Pennsylvania, and has been so engaged for many years. It has large amounts invested in plant, and equipment, and it purchases milk from many producers, supplies many consumers, and employs many persons in said business.

65

3. That appellant has been the holder of and has operated under milk dealer's licenses issued by the Milk Control Commission of the Commonwealth of Pennsylvania at all times since such licenses have been required by law.

4. That on February 18, 1941 the Milk Control Commission of the Commonwealth of Pennsylvania (hereinafter called the Commission), issued a citation against appellant to show cause why appellant's license as a milk dealer for the year May 1, 1941 to April 30, 1942 should not be refused for offering to sell and selling milk to the United States government at less than the minimum prices fixed by the Commission for general sales of milk.

5. Appellant filed an answer to said citation, to which the Commission replied. A hearing was held before the Commission on March 18, 1941 on citation, answer, reply and stipulated evidence.

6. That on March 24, 1941, the Commission issued the following order in said proceeding:

"And now, this 24th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive, is refused for the reasons above stated."

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Said order was accompanied by an opinion, findings, and discussion, a copy of which is hereto attached, made a part hereof, and marked Exhibit A.

7. That said order is erroneous, and the Commission erred in entering it, for the reasons hereinafter set forth, to wit:

8. The said order is unconstitutional and void and beyond the jurisdiction of the Commission, in that it attempts to interfere with and regulate a contract between appellant and the United States and to prevent performance of said contract, or to penalize appellant for making and performing it.

9. The said order is an unlawful and unconstitutional interference with the raising and supporting of the armed forces of the United States.

10. The said order violates Article I, Section 8 of the Constitution of the United States.

11. The said order would prevent appellant from carrying on its lawfully established business, and would deprive it of its property and the use thereof without due process of law and contrary to the law of the land, in violation of Amendment XIV of the Constitution of the United States, Article I, Sections 1 and 9 of the Constitution of Pennsylvania.

12. The Commission erred in concluding that the actions of appellant complained of in said citation were in violation of the Commission's Official General Order No. A-6 as amended, and that sale prices under said contract are in violation of any legally established minimum price applicable thereto.

67 13. The Commission erred in finding that its Official General Order No. A-6 fixed minimum wholesale prices applicable to said contract.

14. The Commission has not established any general order or fixed any minimum re-sale price expressly, or legally or reasonably applicable to sales of milk in such quantities and under such conditions as are involved in said contract.

15 The Commission erred in disregarding the uncontradicted evidence produced by appellant as to costs of supplying milk under said contract as compared with costs under ordinary sales circumstances.

16. The Commission erred in finding that appellant's testimony "does not show that Official General Order No. A-14, is inapplicable to the facts of this case or invalid."

17. The Commission erred in ruling that its said General Orders are applicable to sales to the United States or to an instrumentality of the United States.

18. Application of said General Orders to said contract and to sales in such quantities and under circumstances set forth in the evidence and pleadings is unreasonable and arbitrary in that it disregards the relation of production costs to selling price, and has no reasonable relation to the purposes for which resale prices

are established and upon the basis of which such price fixing has been legally sustained.

19. The Commission erred in basing its order in this case on an assumption or suggestion that appellant should have assumed the burden of instituting proceedings to have a different minimum price fixed by general order. The Commission has ample authority to on its own motion amend or revise its order as to prices.

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20. Appellant reserves the right to amend, amplify and supplement its specifications of error hereinabove stated.

21. This appeal is not taken for purposes of delay but because appellant verily believes it has been legally aggrieved by the order from which it appeals, and in order to have the matter determined according to law.

Therefore appellant respectfully prays the Court

(a) To declare the order herein appealed from ineffective, unconstitutional and void.

(b) To remit said order to said Commission with directions that it be revoked.

(c) To impose the costs on the said Commission.

(d) To grant such further, or other relief as law, equity, and justice require.

PENN DAIRIES, INC.,
Appellant.
By E. L. GARBER, *Pres.*

ARNOLD & BRICKER,
Attorneys for Appellant,
110 E. King St., Lancaster, Pa.

69 [*Duly sworn to by E. L. Garber; jurat omitted in printing*]

In the Court of Common Pleas of Lancaster County

Petition for supersedeas

To the Honorable, the Judges of the Court of Common Pleas of Lancaster County, Pa.

The petition of Penn Dairies, Inc. respectfully represents:

1. That it is the appellant named in the within appeal petition, being an appeal from an order of the Milk Control Commission of the Commonwealth of Pennsylvania.

2. That by said order, your petitioner's license to operate as a milk dealer in Pennsylvania would be refused from April 15, 1941 to April 19, 1941 both inclusive.

3. That the matters involved in said appeal are substantial matters of controversy as to the reasonableness, legality, and con-

stitutionality of the Commission's order, and of the jurisdiction of the Commission. The controversy involves sales of milk to the armed forces of the United States.

70 4. That if said order should be put into force pending disposition of said controversy, it would cause your petitioner irreparable injury in stoppage of extensive operations, would cause injury to large numbers of producers from whom appellant purchases milk and to consumers, including the United States Army to whom appellant supplies milk. The complaint being that appellant sold milk for less than the Commission seeks to require it to charge, no injury can be done to any person by suspension of the operation of said order pending disposition of said appeal.

Therefore your petitioner respectfully prays the Court to direct that the within appeal shall operate as a supersedeas, and to stay all proceedings with respect to the order appealed from until final disposition of said appeal.

PENN DAIRIES, INC.,
By: E. L. GARBER, *Pres.*

(Affidavit omitted.)

In the Court of Common Pleas of Lancaster County

Order of supersedeas

April 7, 1941

And now, April 7, 1941 it is ordered that the within appeal of Penn Dairies, Inc. from order of the Milk Control Commission of the Commonwealth of Pennsylvania, entered March 24, 1941 suspending said appellant's milk dealer's license shall operate as a supersedeas and all proceedings under said order are hereby stayed until final disposition of said appeal, the appellant having filed approved bond in the sum of $750.00.

By the Court,

OLIVER S. SCHAEFFER, *P. J.*

71 In the Court of Common Pleas of Lancaster County

Answer to appeal

Filed April 25, 1941

To the Honorable the Judges of Said Court:

And now comes the Milk Control Commission of the Commonwealth of Pennsylvania, appellee in the above proceeding, by

Frank E. Coho, Deputy Attorney General, and answers the appeal of Penn Dairies, Inc., in the above case, as follows:

1. The Milk Control Commission of the Commonwealth of Pennsylvania, appellee, hereinafter sometimes referred to as the "Commission," admits the allegations of paragraph 1 of the petition of appeal.

2. The Commission admits the allegations of paragraph 2 of the petition of appeal.

3. The Commission admits the allegations of paragraph 3 of the petition of appeal.

4. The Commission admits the allegations of paragraph 4 of the petition of appeal.

5. The Commission admits the allegations of paragraph 5 of the petition of appeal.

6. The Commission admits the allegations of paragraph 6 of the petition of appeal.

7. The Commission denies the allegations of paragraph 7 of the petition of appeal for the reasons hereinafter set forth.

8. The Commission denies the allegations of paragraph 8 of the petition of appeal, and in answer thereto avers that said
72 order is valid and within the jurisdiction of the Commission because it is a regulation of the appellant milk dealer in the same manner as other milk dealers operating in Pennsylvania are regulated, and no discrimination is made in the customers with whom the appellant or other milk dealers conduct business.

9. The Commission denies the allegations of paragraph 9 of the petition of appeal, and in answer thereto avers that the order of the Commission relates only to the appellant milk dealer and is not directed to the United States or any instrumentality thereof.

10. The Commission denies the allegations of paragraph 10 of the petition of appeal, and in answer thereto avers that the transactions concerned in the present case raise no questions of interstate commerce.

11. The Commission denies the allegations of paragraph 11 of the petition of appeal, and in answer thereto avers that the order of the Commission would deprive the appellant from carrying on its lawfully established business only for cause shown by due process of law as has been decided in Commonwealth vs. Rohrer, 37 Pennsylvania District and County Reports 410, 421; Rohrer v. Milk Control Board, 322 Pa. 257; Colteryahn Sanitary Dairy v. Milk Control Commission, 332 Pa. 15; Harrisburg Dairies Inc. v. Eisaman, 338 Pa. 58, and Rieck-McJunkin Dairy Co. v. Milk Control Commission, — Pa. —, decided March 24, 1941.

12. The Commission denies the allegations of paragraph 12 of the petition of appeal, and in answer thereto avers that the

73 record before the Commission showed that the actions of appellant were in violation of Official General Order A–6 as amended, and that the prices charged by appellant were in violation of legally established minimum prices applicable to the transactions in question.

13. The Commission denies the allegations of paragraph 13 of the petition of appeal, and in answer thereto avers that the record before the Commission supported its finding that Official General Order No. A–6 fixed minimum wholesale prices applicable to said contract.

14. The Commission denies the allegations of paragraph 14 of the petition of appeal, and in answer thereto avers that Official General Order No. A–6 as amended does fix minimum prices to be charged by the appellant and other milk dealers that are legally and reasonably applicable to sales of milk in such quantities and under such conditions as are involved in the present contract.

15. The Commission denies the allegations of paragraph 15 of the petition of appeal, and in answer thereto avers that the testimony on behalf of the appellant did not warrant the Commission in declaring Official General Order No. A–6 as amended invalid under the circumstances present.

16. The Commission denies the allegations of paragraph 16 of the petition of appeal, and in answer thereto avers that the Commission properly found that appellant's testimony did not show that Official General Order No. A–6 as amended by Official General Order No. A–14 was inapplicable to the facts of this case or invalid.

17. The Commission denies the allegations of paragraph
74 17 of the petition of appeal, and in answer thereto avers that the Commission properly ruled that the sale to the purchasing officer at Indiantown Gap was subject to the same regulations as sales to other consumers.

18. The Commission denies the allegations of paragraph 18 of the petition of appeal, and in answer thereto avers that in a proceeding between the Commission and appellant milk dealer it would be improper for the Commission to revise its price-fixing order without allowing all other interested parties an opportunity to be heard, as is required by Section 801 of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j–801.

19. The Commission denies the allegations of paragraph 19 of the petition of appeal, and in answer thereto avers that the only application to revise the minimum prices prescribed in Official General Order A–6 as amended has been the defense set up by the appellant to this citation proceeding to refuse a milk dealer's license.

20. Paragraph 20 of the petition of appeal requires no answer.

21. Paragraph 21 of the petition of appeal requires no answer.

Wherefore, the Milk Control Commission of the Commonwealth of Pennsylvania, appellee herein, respectfully prays your Honorable Court to affirm the order of said Commission.

FRANK E. COHO,
Deputy Attorney General,
Attorney for Appellee.

(Affidavit omitted.)

75 In the Court of Common Pleas of Lancaster County

Motion for leave to file suggestion of the interest of the United States in the matter of litigation

June 9, 1941

Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, at the direction of the Attorney General of the United States of America, made pursuant to R. S. § 367, respectfully moves the Court for leave to appear in this action in his proper person for the purposes of filing the attached suggestion of the interest of the United States in the matter in litigation and of asserting such interest in this action and attending thereto. The grounds for this motion are as follows:

1. The United States has an interest and concern in the subject matter and outcome of this action, in opposition to the special order of the Milk Control Commission of the Commonwealth of Pennsylvania, issued on March 24, 1941 and described in the complaint filed herein by the Penn. Dairies, Inc. and to which reference is respectfully made, all as more fully set forth and explained in said suggestion; and pursuant to R. S. § 367, the Attorney General has directed the undersigned to present the annexed suggestion of the interest of the United States and to attend to the interests of the United States in this suit:

2. That the United States cannot be made a party defendant to this action under any existing provision of law.

76 Annexed hereto is a pleading entitled "Suggestion of the Interest of the United States in the Matter in Litigation." The undersigned moves that said pleading be deemed his appearance in his proper person for the assertion of and attendance to the interests of the United States therein set forth.

The undersigned further moves that the Court enter an order granting this motion and each part hereof and that such order further provide that the undersigned shall receive notice of all

proceedings herein and service of all papers required to be served upon parties to the action.

GERALD A. GLEESON,
United States Attorney.

Of Counsel
ENOCH E. ELLISON,
Attorney,
United States Department of Justice.

In the Court of Common Pleas of Lancaster County

Suggestion of the interest of the United States in the matter in litigation

June 9, 1941

Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, at the direction of the Attorney General of the United States of America, appears herein in his own proper person, and for the said United States gives the Court to understand and be informed as follows:

1. The United States of America (hereinafter sometimes called the "Government"), acting by and through the War Department, in order to provide for the common defense, at all relevant times has quartered and maintained, and continues to quarter and maintain, certain troops of the United States Army on certain lands known as the Indiantown Gap Military Reservation and located at Indiantown Gap, Pennsylvania, by means of public funds of the United States which have been duly appropriated by the Congress of the United States for such purposes and duly allocated thereto. With such funds the Government purchases, from time to time, among other things, large quantities of food, including milk and milk products, by and through its duly authorized Purchasing and Contracting Officer and its Finance Officer at said Reservation. The procurement of such food is indispensable to the continued health, subsistence and maintenance of such troops, and such purchases are made by said officers in strict accordance with the provisions of federal law and regulations with regard to procurement of such supplies.
78 The foods so purchased through said officers must comply with United States Army specifications and can be received for consumption only after they have passed the prescribed sanitary and specification inspections.

2. Pursuant to the requirements of federal statutes and on February 1, 1941, the said Purchasing and Contracting Officer

issued to each of a large number of milk dealers in the vicinity of said Reservation, including the Penn Dairies, Inc., petitioner herein, Invitation No. qm 517–41–14, which was accompanied by a Standard Government Form of Bid and a schedule of Special Purchase Conditions. By such papers each milk dealer was invited to submit bids on the said Standard Government Form of Bid as to the lowest prices at which it would supply certain items of milk and milk products set forth in the Continuation Schedule appended thereto. True copies of said Invitation and said Special Purchase Conditions are appended hereto, marked Exhibit "A" and Exhibit "B," respectively, and made parts hereof. Thereafter bids were received from 25 milk dealers on said Standard Government Form of Bid, including the said Penn Dairies, Inc., which submitted the lowest bids on items numbered 1, 3, and 7. A true copy of the bids of the said Penn Dairies, Inc., on said Standard Government Form of Bid is appended hereto, marked Exhibit "C" and made part hereof. The said bids of Penn Dairies, Inc., as to items numbered 1, 3, and 7 were accepted and the contract thereon was duly awarded to the Penn Dairies, Inc. Under date of March 1, 1941, a formal purchase order confirming the contract, a true copy of which is appended hereto, marked Exhibit "D" and made part hereof,
79 was duly issued and the Penn Daries, Inc., entered upon the performance of said contract.

3. The undersigned is informed and believes that it appears from papers already on file in this cause that, after the events described in paragraphs 1 and 2 hereof had transpired, the Penn Dairies, Inc. applied to the Milk Control Commission of the Commonwealth of Pennsylvania (hereinafter called the "Commission") for renewal of its milk dealer's license; that such application was denied by a special order issued March 24, 1941; and that a copy of such order appears as "Exhibit A" to the petition of the Penn Dairies, Inc., which said "Exhibit A" is adopted by this reference and prayed to be taken and considered as a part hereof as fully and completely as if set forth at length herein. It appears from said order that said application was denied upon the sole ground that in contracting with the Government as aforesaid, or in performing said contract, or both, the Penn Dairies, Inc. was found by the Commission to have violated certain laws of the State of Pennsylvania in that it offered to sell and sold the milk described in items numbered 1 and 3 of said contract at prices lower than the minimum price at which it was authorized to sell such milk by such laws and a certain General Order of the Commission.

4. In issuing said Special Order the Commission in effect held that sales of milk to the Government could be made only under authority of, pursuant to and in accordance with its said General Order and that any contract between the Government and any milk dealer in Pennsylvania whereby the latter agrees to
80 supply the Government with milk at a price lower than the minimum price fixed by the Commission is violative of the laws of the State of Pennsylvania.

5. Said Special Order constitutes a threat, against all milk dealers in the State of Pennsylvania, that similar action will be taken against them if they sell milk or milk products to the Government at prices lower than the minimum prices so fixed by the Commission.

6. If the said Special Order of the Commission is sustained, the Government will be irreparably injured by it in that it will not be able to procure milk for its armed forces, and for other governmental purposes, at prices lower than those fixed by the Commission, whereas, if said Special Order is set aside the United States will be able to make such purchases at the lowest prices at which the competing milk dealers are willing to sell. Accordingly the United States has an interest and concern in the subject matter and outcome of this litigation.

7. The United States is a sovereign Government, and is neither a "person" nor a "consumer" within the meaning of the Milk Control Law of Pennsylvania, and such law does not, and should not be construed to, authorize the Commission to fix minimum prices for the sale of milk or milk products to the United States;

8. Insofar as the provisions of the said Milk Control Law, or of any other law of the State of Pennsylvania, purport, or may be held, to authorize the Commission to regulate the minimum prices at which the Penn Dairies, Inc., or any other milk
81 dealer, may sell milk or milk products to the United States the same can not constitutionally be given such effect because they would conflict with laws of the United States (particularly R. S. 3709, 41 U. S. C § 5 and 10 U. S. C. §§ 1200, 1201), which are the supreme law of the land and binding upon the judges of the State of Pennsylvania, anything in the Constitution or laws of said State to the contrary notwithstanding.

9. The transactions and events described in paragraphs 1 and 2 hereof, transpired exclusively under the authority of and pursuant to the laws of the United States and were and are not dependent for their validity upon the laws of the State of Pennsylvania in any respect. The legislative authority of the State of Pennsylvania does not extend to said events and transactions,

nor does it permit the regulation of the prices which the United States must pay in order to procure the necessary provisions and supplies for its armed forces.

10. The said General Order of the Commission, if it were applicable to sales of milk and milk products to the Government, would constitute an unconstitutional burden upon, and interference with, the United States in the performance of its constitutional duties and functions.

11. If the said Milk Control Law, or any other law, of the State of Pennsylvania should purport, or be construed, to authorize the Commission to issue its said Special Order, or to decline to issue a milk-dealer's license to the Penn Dairies, Inc., by reason of any of the events described in paragraphs 1 and 2 hereof, or in the findings of fact made by the Commission,
82 the same is, to that extent, unconstitutional and inoperative because it is violative of the Constitution of the United States and particularly of Article I, Sec. 8, and of Article VI thereof, the Fourteenth Amendment thereto, and the implied provisions thereof.

Wherefore, the undersigned respectfully prays:

1. That, if for any reason any of the relevant findings of fact or allegations of the Commission should be deemed by the Court to be inconsistent with, or contrary to, any of the facts set forth herein, the Court should make, or cause to be made (through a remand or otherwise), by appropriate proceedings, a determination as to the truth or falsity of said findings or allegations.

2. That the Court determine and declare that the Commission is without lawful power or authority to fix or regulate the minimum prices which may be charged by milk dealers in making sales of milk and milk products to the United States.

3. That the Court declare the order herein appealed from, by the Penn Dairies, Inc., ineffective, unconstitutional and void.

4. That the Court remit said order to the Commission with directions that it be revoked.

5. And for such other and further relief as may be meet and proper.

GERALD A. GLEESON,
United States Attorney.

Of Counsel:
ENOCH E. ELLISON,
Attorney,
United States Department of Justice.

83 *Exhibit "A" to suggestion*

[All exhibits received in evidence by agreement at bar in court below.]

Standard Form No. 30.

Approved by the President June 10, 1927.

STANDARD GOVERNMENT FORM OF INVITATION FOR BIDS

(Supply Contract)

Invitation No. qm 517-41-14

February 1, 1941

DUPLICATE

Sealed bids, in triplicate will be received in this office until the date and hour named in the accompanying schedules and then publicly opened, for furnishing the materials and supplies called for therein.

Bids must be submitted upon the Standard Government Form of Bid (Standard Form No. 31), and in accordance with the Standard Government Instructions to Bidders (Standard Form No. 22) and any special instructions supplementary thereto.

Envelopes containing bids must be sealed and marked on the upper left-hand corner with the name and address of the bidder and the date and hour of opening an addressed to the purchasing agency named below:

PURCHASING AND CONTRACTING OFFICER,
Office of the Quartermaster
Indiantown Gap, Pennsylvania.

84 Marked: Bid for Milk, Buttermilk and Ice Cream—March 1 to June 30, 1941. Requirements.

To be opened: 10.00 a. m. Eastern Standard Time, February 15, 1941.

Page No. 1—Estimated Quantities are Monthly Requirements.

Note re Exhibit "B" to suggestion

[Exhibit B attached to the suggestion filed by the United States consists of "special purchase conditions" in connection with bids and contracts for various articles purchased by the United States, including milk. The portions thereof which are deemed pertinent to this case are set forth at length in the Commission's citation by which this proceeding was begun, and reference is hereby made thereto. To avoid encumbering the record the entire conditions are not printed.]

Exhibit "C" to suggestion

Standard Form No. 31.
Approved by the President June 10, 1927.

STANDARD GOVERNMENT FORM OF BID

(Supply Contract)

Invitation No. qm 517–41–14

February 1, 1941

85 Original
Duplicate
Triplicate

(Indicate which by erasure)

Opening Date for this Bid 10:00 a. m., E. S. T. February 15, 1941.

To Purchasing and Contracting Officer. Place, Lancaster, Pa., Indiantown Gap, Pennsylvania. Date, February 12, 1941.

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered: qm 517–41–14, Pages 1 to 3 inclusive and Sheets 1 to 9 inclusive, which are a part of this bid (for the period from March 1 to June 30, 1941 inclusive), the undersigned, a corporation organized and existing under the laws of the State of Pennsylvania, a partnership consisting of an individual trading as of the city of Lancaster, Pa., hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within _____ days (30 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bids as accepted, and to give bond, if
86 required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 10 calendar days _____ percent; 20 calendar days _____ percent; 30 calendar days _____ percent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those

points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.)

PENN DAIRIES, INC.
(Full name of bidder.)
(s) J. F. GARBER,
J. F. Garber, *Treasurer*,
572 N. Queen St., Lancaster, Pa.
(Address)

(s) L. B. ALTHOUSE,
(Witness to signature.)
L. B. Althouse.

Bids must be properly witnessed; signed in Ink, and Submitted in Triplicate Sets. Page numbered _____ have been recovered.

87 NOTE.—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

To insure prompt payment bills should be certified as follows: See Paragraph 11, Page 3.

10-1803

U. S. Government Printing Office

Page No. 2

Standard Form No. 36.
Approved by the President June 10, 1937.

STANDARD GOVERNMENT FORM OF CONTINUATION SCHEDULE FOR STANDARD FORM 31 OR 33
(Supplies)

Invitation No. qm 517-41-14.

Item No.	Articles or services	Estimated quantity	Unit	Unit price	Amount Dls. Cts.
1	Milk, fresh, grade A, pasteurized, 1 qt. bottles, W/sanitary protective type caps, type II C-M-381B	135,000	Btl	.079	10,665.00
	ALTERNATE				
2	Milk, fresh, grade A, pasteurized, 1 qt. fiber containers, nonreturnable, type II, C-M-381B	125,000	Con		
3	Milk, fresh, grade A, pasteurized, ½ pt. bottles, W/sanitary protective type caps, type II-C-M-381B	540,000	Btl	.0215	11,610.00
88	ALTERNATE				
4	Milk, fresh, grade A, pasteurized, ½ pt. fiber containers, nonreturnable, type II C-M-381B	540,000	Con		
5	Buttermilk, plain, pasteurized, 1 qt. bottles, type A C-B-816	5,760	Btl	.07	403.20

Item No.	Articles or services	Estimated quantity	Unit	Unit price	Amount Dols. Cts.
	ALTERNATE				
6	Buttermilk; plain, pasteurized, 1 qt. fiber containers, nonreturnable, type A, C-B-816	5,760	Con		
7	Ice cream, brick form, quart containers, cut 7, 8, or other cuts, commercial flavors as called for EE-I-116A	720	Gal	.779	560.88

PENN DAIRIES, INC.
(*Bidder*).

Page 3—10-1800 (over)

89 *Exhibit "D" to Suggestion*

War Department.
Q. M. C. Form No. 308.
Revised April 19, 1937.

PURCHASE ORDER

War Department

Date March 1, 1941.

OFFICE OF THE QUARTERMASTER,
Indiantown Gap, Pa.
To PENN DAIRIES, INC.,
572 N. Queen Street, Lancaster, Pa.
Ship to Sales Officer Indiantown Gap Military Reservation.
Contract No. (If any) W qm 517-41-30.
Purchase Order (Office Identifying) No. O. I, qm 517-41-83.
Requisition No.

To expedite payment place the above numbers on all packages, bills, and correspondence.

Payment will be made by Finance Office at Indiantown Gap Mil. Res., Pa.

To whom invoices, in triplicate, will be rendered. See Par. 7 of instructions on the reverse side hereof.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to Procurement Authority, No. quoted below, the available balance of which is sufficient to cover cost of same.

Auth. No. QM 13-P1-0260-A-0505-01.

90 In acordance with your formal bid dated February 15, 1941, No. qm 517-41-14, and subject to all conditions and requirements thereof, award is hereby made you for furnish-

ing the following articles. Allowable variations from quantities cited ..... per cent, exclusive of condition 7 on reverse side hereof.

Discounts Net.
F. O. B. Indiantown Gap, Pa.
Deliveries As Needed.
Inspection Indiantown Gap, Pa.

Quantity estimated	Unit	Article	Unit price	Total price
135,000	Btl	Milk, fresh, grade A, pasteurized, 1 qt. bottles W/sanitary protective type caps, type 11 C-M-381B.	$0.079	$10,665.00
540,000	Btl	Milk, fresh, grade A, pasteurized, ½ pt. bottles with sanitary protective type caps, type 11 C-M-381B.	.0215	11,610.00
720	Gal	Ice cream, brick form, quart containers, cut 7, 8, or other, cuts, EE-I-116A.	.779	560.88
		Total		22,835.88

JESSE E. DOCK,
1st. Lt. QMC,
Purchasing and Contracting Officer.

3-6743 (Stamped):
Certified True Copy.

JESSE E. DOCK,
1st. Lt. QMC,
Purchasing and Contracting Officer.

91 In the Court of Common Pleas of Lancaster County

Order allowing appearance for United States, etc.

June 9, 1941

This cause came on to be heard on the motion of Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, for leave to appear in this action in his proper person for the purpose of suggesting in the interest of the United States, in the matter in litigation, and for other purposes, as directed by the Attorney General of the United States pursuant to R. S. Sec. 367, and upon consideration thereof, it is

Ordered that said motion is in all respects granted; and it is further

Ordered that Gerald A. Gleeson, United States Attorney, is hereby granted leave to appear in this cause for the purposes of suggesting the interest of the United States in the matter in litigation and of asserting such interest in this action and attending thereto, and that he shall receive notice of all proceedings

herein and service of all papers required to be served upon parties to the action; and it is further

Ordered that the pleading entitled "Suggestion of the Interest of the United States in the Matter in Litigation," annexed to said motion, be filed, and be deemed the appearance of the said United States Attorney in his proper person for the assertion of and attendance to the interests of the United States set forth in said Suggestion.

OLIVER S. SCHAEFFER,
President Judge.

Dated June 9, 1941.

92 In the Court of Common Pleas of Lancaster County

Opinion

July 25, 1941

SCHAEFFER, P. J.

The question for decision by the court is whether a milk dealer of Pennsylvania selling milk to the United States Government for use at a Military Reservation, located at Indiantown Gap, Pennsylvania, is subject to the minimum price orders of the Milk Control Commission of Pennsylvania in respect to such sales.

On March 5, 1941 the Milk Control Commission of Pennsylvania issued a citation to Penn Dairies, Inc., of Lancaster, Pennsylvania, to show cause why its application for a license to do business as a milk dealer for the year beginning May 1, 1941, and ending April 30, 1942, should not be refused, because it offered to sell and sold milk at less than the minimum prices as fixed by the Milk Control Commission of Pennsylvania. At a hearing held on March 18, 1941, Penn Dairies, Inc., admitted selling milk to the United States Government at less than the minimum prices, being at the rate of $0.079 instead of $0.095 for fresh pasteurized milk in quart bottles, and at $0.0215 instead of $0.025 for half pints, contrary to subdivision B of Section 4 of Official General Order A-6, as amended by Official General Order A-14 of the Commission. On March 25, 1941, the Milk Control Commission of Pennsylvania entered an order refusing the application of the Penn Dairies, Inc., for a milk dealer's license. An appeal was taken to this court and a supersedeas was granted, thereby
93 permitting the appellant to furnish milk to the Indiantown Gap Military Reservation under the contract until final disposition of this appeal. On June 9, 1941 the United States, upon petition and a suggestion of interest in the pending litigation, was allowed to intervene.

It is conceded as a general legal proposition that a State cannot regulate an instrumentality of the United States Government if it constitutes a direct burden upon the Government and interferes with the performance of its functions. Should it be invoked and applied in all cases, especially where public policy justifies its waiver? In Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 60 S. Ct. 279, it is said "That petitioner is subject to the Social Security Act [of Arkansas] is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency problem. As pointed out by this Court in Steward Machine Co. v. Davis, supra, 301 U. S. page 588, 57 S. Ct. page 891; 81 L. Ed. 1279, 109 A. L. R. 1293, that Act was an attempt to find a method by which the states and the federal government could 'work together to a common end'." In the Pennsylvania Milk Control Act of April 28, 1937, P. L. 417, the Legislature provided in Section 311: "The commission is hereby vested with authority to confer with legally constituted authorities of other states and of the United States with respect to uniform milk control within the states and as between states, to conduct joint investigations, to exchange information, hold joint hearings and issue joint, complementary or concurrent orders, and to enter into a compact or compacts for such uniform milk control,
94 subject to such Federal approval as may be authorized or required by law." Subdivision (i) of Section 10 of the Act of Congress of May 12, 1933, c. 25, Title I, 48 Stat. 37, as amended and reenacted by the Act of June 3, 1937, c. 296, Section 1, 7 U. S. C. A. Section 610 (i), shows that the state and federal price control laws relating to milk and other agricultural commodities are intended to be as uniform and all-inclusive as possible. This subdivision provides: "The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities." "Agricultural commodities" as used in these Acts mean, inter alia, "milk and its products." 7 U. S. C. A. Section 611.

The Commission contends that "one who contracts with the United States for the performance of services or the supply of materials does not thereby obtain immunity from state regulations." It is admitted that employes or officers of the United

States are free from state regulations that interfere with the functions of government. Ohio v. Thomas, 173 U. S. 276, 19 S. Ct. 453. However, this immunity generally is not applicable to private persons or corporations who enter into contracts with the United States Government to furnish materials or to render services in an independent capacity. In Metcalf & Eddy v.
95 Mitchell, 269 U. S. 514, 46 S. Ct. 172 (1926), Mr. Justice Stone referred to a party claiming immunity, "who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government or an impairment of the efficiency of its agencies in any substantial way." In James Stewart & Co. v. Sadrakula, 309 U. S. 94, 60 S. Ct. 431 (1940), the Supreme Court said: "While, of course, in a sense the contract is the means by which the United States secures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity." In Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 60 S. Ct. 279 (1939) supra, it is stated: "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319." In Baltimore and Annapolis Railroad Co. v. Lichtenberg, United States, Intervener, 176 Md. 383, 4 Atl. (2d) 734 (1939), it was decided that the Public Service Commission of Maryland had power to require a certificate from a contractor engaged solely in the carrying of passengers for the Federal Government on a public project. It is said: "The court is of opinion that there is no such interference as is prohibited to the State by the United States Constitution. Only the use of the roads of the State by an independent
96 contractor is dealt with. There is no interference with any governmental instrumentality. A private instrumentality is availed of by contract, its use of the roads for gain to be turned to the service of the Government. And, as already stated, the court sees no foundation for holding that the Government may, for its greater convenience or for the sake of economy, relieve the contractor of the obligation to conform to the law. Such an independent agency, engaged in its independent trade, must, in our opinion, be considered unchangeably subject to the law in its operation whether it contracts for its services with the Government or with promoters of private enterprises. See James v.

Dravo Contracting Co., 302 U. S. 134, 149, 58 S. Ct. 208." The Supreme Court said: "The appeal is dismissed for want of a substantial Federal question."

The United States Government contends that the Commission seeks "to regulate or control the activities of the Federal Government," and that "the individual States are without constitutional authority to apply their several police power laws to the United States." The United States relies upon the immunity as defined by Mr. Chief Justice Marshall in 1819 in McCulloch v. Maryland, 4 Wheat. 316, 436, involving the right of the State to tax a bank of the United States. He said: "The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." In Johnson v. State of Maryland, 254 U. S. 51 (1920), Mr. Justice Holmes delivered the opinion of the court. There the question related to the necessity of a state license to
97 operate a government motor truck on the highways by an employe of the United States Post Office Department. He quoted from Osborn v. Bank of the United States, 9 Wheat. 738, as follows: "'Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.' In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not 'subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority'." Later in 1928 in a dissenting opinion by Mr. Justice Holmes, Panhandle Oil Co. v. State of Mississippi, 277 U. S. 218, 48 S. Ct. 451, joined in by Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice McReynolds, he said: "To come down more closely to the question before us, when the Government comes into a State to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the State that makes the business possible
98 is just as necessary an element in the cost of production as labor or coal. * * * It does not appear that the Government would have refused to pay a price that included the

tax, if demanded, but if the Government has refused it would not have exonerated the seller. Pierce Oil Corporation v. Hopkins, 264 U. S. 137, 139, 44 S. Ct. 251." He referred to the Coast Guard or the officials of the Veterans' Hospital as instrumentalities of government, but said: "The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. Metcalf v. Mitchell, 269 U. S. 514, 46 S. Ct. 172." Mr. Justice McReynolds in his dissenting opinion said: "The doctrine of immunity is well established, but it ought not to be extended beyond the reasons which underlie it. * * * The federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necesary powers of the States, or prevent their efficient exercise."

The attitude of Mr. Chief Justice Hughes on the question at issue in this case is set forth aptly in an article by Robert H. Jackson, as Attorney General of the United States, in the American Bar Association Journal of July, 1941, Volume 27, page 410, as follows: "Apart from the field of taxation, however, the Chief Justice has gone very far in sustaining state regulatory statutes, particularly those which have been assailed as being in conflict with federal power. He has always appeared careful to concede the broad sweep of federal authority which could supersede the state statute if Congress should so desire; but even where Congress has legislated in the field, he has generally upheld the state statute if it was not in conflict with the federal legislation. State regulatory statutes generally have received hospitable consideration at his hands. His opinion in the historic Minnesota Mortage Moratorium case is illustrative of his willingness to respect the action of the legislature except where there is a clear constitutional prohibition." In James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, supra, Mr. Chief Justice Hughes delivered the majority opinion of the court. He said referring to taxation by either the State or Federal Government: "As 'neither government may destroy the other or curtail in any substantial manner the exercise of its powers,' we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other. * * *'" He also said: "The contention ultimately rests upon the point that the tax increases the cost to the government of the service rendered by the taxpayer. But this is not necessarily so. * * * If the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden which is consequential and remote and

not to one that is necessary, immediate or direct'." Mr. Justice Roberts in his dissenting and minority opinion held that a sales tax on commodities sold to the Government, though laid upon the seller, is invalid as directly burdening the Government's transaction. In referring to the principle of Federal immunity he said: "The question is not one of quantum, not one of the weight of the burden, but one of power. * * * Where the principle *applies* it is not affected by the amount of the particular tax or the
100 extent of the resulting interference, but is absolute." [Italics supplied.]

It seems that such difference of opinion arises not as to the fundamental law, but rather as to its application to the facts and circumstances of each case. In the construction of the Milk Control Act of Pennsylvania by Mr. Justice Roberts in Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528 (1939), he said: "But in matters requiring diversity of treatment according to the special requirements of local conditions the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their *application*." [Italics supplied.]

In Paterson Milk & Cream Co., Inc. v. Milk Control Board
101 et al., decided by the Supreme Court of New Jersey in 1937, 192 Atl. 838, it is said: "The second point made is that sales made to the United States government by the prosecutor, at prices below those fixed by the Milk Control Board, were not subject to the Milk Control Act of this state. * * * It was settled in Trinity Farm Construction Company v. Grosjean, 291 U. S. 466, * * * that where the United States deals with a corporation the corporation with which it deals is subject to state regulations. Hence, it would seem that the prosecutor was obliged

to obey the reasonable regulations of the Milk Control Board of this state, and the fact that he dealt with the United States government is no justification for his disregard of the reasonable regulations of this state." In Milk Control Board v. Gosselin's Dairy, Inc., 16 N. E. 2d 641, the Supreme Judicial Court of Massachusetts in 1938 said: "It is conceded of course, fully and ungrudgingly, that a State cannot attempt to regulate an instrumentality of the United States or impose burdens upon it which interfere with its operation and efficiency. On the other hand we apprehend that an institution of the Federal government situated within a State cannot wholly escape every consequence arising from a fact so pervasive and insistent as is the fact of location in the midst of a civilized community whose orderly existence and continuance are derived from and supported by another sovereignty of general powers. * * * There is no discrimination against the hospital. It can buy milk as others buy milk and at any price which competition may fix not lower than the established minimum. No burden upon it can result, even indirectly, which does not likewise fall upon all users of milk, including institutions of this
102 Commonwealth of comparable nature. No attempt is made in the law, or in the order of the board, or in this litigation to control or to give any order or direction to the veterans' hospital or to any of its officers. The incidence of the law is upon dealers in milk. Although enforcement of the law against such dealers may in fact affect the price of milk to the hospital as well as to others, yet that result is in its nature incidental and collateral rather than immediate and direct. . . . We incline to the view that a dealer furnishing milk in this Commonwealth to the veterans' hospital remains bound by the Massachusetts milk control law." This court in Commonwealth v. Wayne L. Rohrer, 45 Lanc. L. R. 553 (1937) reached a similar conclusion.

It is contended also that "the Milk Control Law does not purport and should not be construed to authorize the Commission to fix prices for sales of milk to the United States." Article VIII, Section 802 of the Milk Control Law of April 28, 1937, P. L. 417, authorizes the Commission to fix prices for milk sold, inter alia, by milk dealers to consumers. According to Article I, Section 103 of the Milk Control Law, "'Consumers' means any person, other than a milk dealer, who purchases milk for consumption or use." It is then provided in the same section that "'person' includes an individual, corporation, association, partnership, limited partnership, or other unincorporated enterprise owned by two or more individuals." In Baker et al. v. Kirschnek et al., 317 Pa. 225 (1935), it was decided that the Commonwealth is not a person within the meaning of special Act incorporating the Borough of Media which provides that it shall not be lawful for any

103 person or persons to sell intoxicating liquors within the limits of the borough. The court said: "In construing a statute, words are to be taken in their ordinary sense, unless, from a consideration of the whole act, it appears that a different meaning was intended." In Stanley v. Schwalby, 147 U. S. 508, 517, 13 S. Ct. 418 (1893), it was held that the United States was a "person" and could set up the bar of the state statute of limitations that ran in favor of persons. Mr. Chief Justice Fuller said: "Of course, the United States were not bound by the laws of the State, yet the word 'person' in the statute would include them as a body politic and corporate." In a recent case decided in 1941, United States v. Cooper Corporation et al., 61 S. Ct. 742, which is applicable to the case at bar in the interpretation of the statute in question, Mr. Justice Roberts in delivering the opinion of the court said: "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law. * * * Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction."

104 Whether or not the United States is a person, or a consumer of milk, within the meaning and purpose of the Milk Control Act depends largely upon the purpose or public policy intended to be served by that Act. While it is not the province of the court to determine what constitutes such policy in the field of public health, nevertheless, its purpose, as set forth in the preamble of the Act is recognized in Rieck-McJunkin Dairy Company v. Milk Control Commission of Pennsylvania, 341 Pa. 153 (1941), by Mr. Justice Stern: "The main purpose of the Milk Control Law [is] to insure a sufficient supply of wholesome milk, which cannot be accomplished unless, as the preamble of the act recites, 'the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk'." In United States v. Rock Royal Co-op, Inc., et al., 307 U. S. 533, 59 S. Ct. 993, Mr. Justice Reed said: "The power of a state to fix the price of milk has been adjudicated by this Court. * * * So essential is it for health that the consumer has been

willing to forego unrestricted competition from low cost territory to be assured of the producer's compliance with sanitary requirements." With this purpose and policy in mind the State Legislature intended that the word "consumer" as used in the Milk Control Act with respect to the sale of milk, be all-inclusive. The Act expressly and clearly excepts only a milk dealer. The Statutory Construction Act of Pennsylvania, May 28, 1937, P. L. 1019, Article IV, Section 54, provides: "Exceptions expressed in a law shall be construed to exclude all others." By excluding all others except a milk dealer both provisions of said Section 103, relating to consumer and person, are given effect in carrying out the
105 paramount purpose of the Milk Control Act in accordance with Section 63 of the same Act. In Keating v. White et al., 141 Pa. Superior Ct. 495, 504 (1940), quoting from New York Life Insurance Co. v. Guaranty Corporation, 321 Pa. 359, it is said: "To arrive at the real meaning, it is always necessary to take a broad general view of the act, so as to get an exact conception of its aim, scope and object. * * * The true meaning is to be found, not merely from the words of the act, but from the cause and necessity of its being made, from a comparison of its several parts and from extraneous circumstances." Such construction of the statute is not analogous to the situation presented in the case of Green et al. v. Milk Control Commission et al., 340 Pa. 1 (1940), where it was said: "The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. * * * With the principle stated before us, turning to the law embodying the powers of the Milk Control Commission, we find nothing said about milk shipped to dealers on consignment. * * * We are asked by the Commonwealth to interpolate these words into the Act. This we cannot do without violating the important principle to which we have adverted." The case at bar involves the interpretation of words expressed in the statute rather than supplying words which are wanting in the statute.

It is argued that the Commission's price-fixing authority cannot be applied to government purchases constitutionally, because it would conflict with Federal statutes requiring competitive bidding and price competition. In Title 10 of the United States Code Annotated (July 5, 1884, c. 217, 23 Stat. 109; Aug.
106 24, 1912, c. 391, Section 3, 37 Stat. 591), it is provided in Section 1200 that in the letting of contracts for quartermaster supplies for the Army, "the award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids." However, it is not absolutely required under all conditions and in all instances as shown by Section 1201, Title 10 of the United States

Code Annotated Mar. 2, 1901, c. 803, 31 Stat. 905), which provides as follows: "Except in cases of emergency or where it is impracticable to secure competition, or in cases otherwise provided for, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement; and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered.". In Good Roads Machinery Co. of New England v. United States, 19 Fed. Supp. 652 (1937), it was decided that purchases of material and equipment for a civil works project by an administrator or officer of the United States were made under "public exigency" requiring immediate delivery, and hence advertising for competitive bids was not essential under Section 3709 of the Revised Statutes of the United States (41 U. S. C. A., Section 5).

In a written notice by the Pennsylvania Milk Control Commission to all milk dealers interested in submitting bids to the United States Government at Indiantown Gap, Pennsylvania, the Commission fixed the minimum milk prices to be considered by
107 the bidders in the preparation of their bids with respect to the grades of milk therein mentioned. This order and notice of the Commission did not prevent competitive bidding, after due advertisement, but fixed only the minimum prices to be submitted by the milk dealers of Pennsylvania. Furthermore, the Act of Congress above cited expressly provides that advertising and competitive bidding are not required "where it is impracticable to secure competition, or in cases otherwise provided for." In Lukens Steel Co. et al. v. Perkins et al., 107 Fed. Repr. (2d) 627, the United States Court of Appeals for the District of Columbia in 1939 decided that where a determination of the Secretary of Labor established minimum wages in a particular locality for purposes of public contracts and provided that such minimum wages should apply to all contracts awarded subject to the Act of Congress, it was binding on persons submitting bids for government contracts and on government agencies. This case was affirmed by the United States Supreme Court in 310 U. S. 113, 60 S. Ct. 869, but on other grounds.

The fact that the Commonwealth of Pennsylvania is the owner of the Military Reservation of 12,638¼ acres at Indiantown Gap, Pennsylvania, and permits the United States to use it for its troops, does not affect the fundamental legal question involved in this case, but it indicates a spirit of cooperation in our present national emergency.

Irrespective of the juridical phase of this case in relation to the United States Government and its increasing instrumental-

ities, it is evident that a general compliance with the Milk Control Act in question is in harmony with and promotes both
108 the Federal and State policy to provide pure and wholesome milk not only for our citizens but also for our soldiers.

The conclusion is reached that the appellant as a milk dealer of Pennsylvania is subject to the Milk Control Act of Pennsylvania, and, accordingly, must submit its bids for the sale of milk to the United States Government at the Indiantown Gap Reservation on the basis of minimum prices as promulgated by order of the Commission. Such conclusion is in accord with the decisions of the Supreme Courts of New Jersey and Massachusetts, supra.

In the Court of Common Pleas of Lancaster County

Judgment

July 25, 1941

And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941 refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to the Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained.

By the Court:

OLIVER S. SCHAEFFER, *P. J.*

118 *Supplemental appendix to record*

1. Letter from Under Secretary of War

WAR DEPARTMENT,
Washington, D. C., Apr. 21, 1941.

The Honorable, The ATTORNEY GENERAL.

DEAR MR. ATTORNEY GENERAL: Reference is made to your letter of April 1, 1941, requesting the comments and recommendations of the War Department with respect to the apparent effect of certain portions of Army Regulations No. 5-240 upon the purchase of milk in states where the minimum prices of this commodity are fixed under authority of state law. You suggest that, in order to give any meaning to subparagraph (3) paragraph 4g, Army Regulations No. 5-240, it would appear to be necessary to construe this subparagraph as a recognition on the part of the War Department that states and their local governmental units are authorized to fix the prices at which commodities and services can be sold to the United States to the same

extent that such prices are subject to regulation in transactions between individuals.

Notwithstanding the apparent duplication in certain portions of the regulations in question it is not conceded that either the statutes from which these regulations derive their power, or the regulations themselves when considered with the pertinent provisions of other regulations, or the consistent position of the War Department upon the question at issue, permits the suggested interpretation. It is to be particularly noted that the regulations in question pertain to cases where competition is impracticable, and not to cases of procurement after advertising, thus eliminating instances where two or more firms may furnish the supplies or service.

119

There is inclosed for your information a copy of an approval memorandum of The Judge Advocate General of the Army. Your attention is particularly invited to his recommendation for changes in the regulations under discussion. These changes are now under consideration and after publication a copy of the revised regulation will be forwarded to you. It is recommended that, pending publication of the changes just mentioned, appropriate steps be taken to protect the procurement of milk by the Army from price-fixing laws and regulations of the states.

Sincerely yours,

(Signed) ROBERT P. PATTERSON,
Under Secretary of War.

1 Incl.
Copy Memo. TJAG.

2. Memorandum from the Judge Advocate General

Contracts.
JAG 434.

APRIL 16, 1941.

Memorandum for the Under Secretary of War.

Subject: Letter from Department of Justice concerning application of AR 5-240 to purchase of milk.

130

1. By informal disposition slip from the Office of the Assistant Secretary of War, dated April 5, 1941, there was referred to this office for necessary action and preparation of reply for the signature of the Under Secretary of War, the inclosed letter from the Attorney General (FMS: EEE 106-11-70 219715-41 106-63-23), dated April 1, 1941, concerning the effect of subparagraph 4g, Army Regulations, No. 5-240, February 11, 1936, upon contemplated resistance to state control of the purchase of milk by the Army.

2. Reference was first made by the Attorney General to a recommendation by the Secretary of War contained in letter of March 3, 1941 (QM 434 PC–Proc. (Indiantown Gap)), that the United States Attorney be instructed to take appropriate action to restrain the Milk Control Commission of the Commonwealth of Pennsylvania from interfering with deliveries of milk by Penn Dairies at Lancaster, Pennsylvania, under its contract with the United States, and also to a letter from the Attorney General addressed to the Secretary of War under date of March 6, 1941, relative to the case of Milk Control Commission v. Millard E. Basehoar, Jr., trading as Crystal Springs Dairy, Littlestown, Pennsylvania (WD 324.5 CCC (7–19–40)).

Reference was then made in the letter from the Attorney General to the inclosures which include a copy of a letter from the Consolidated Milk Producers for San Francisco to the Director of Agriculture, State of California, requesting action to enjoin the current and threatened violation of the provisions of the Agricultural Code under contracts between certain local milk dealers and the United States Government to supply milk to the Army at prices below the minimum wholesale schedule established for the San Francisco marketing area. In this letter the Consolidated Milk Producers made the following statement:

121 "* * * Under army regulations No. 5–240, where the price is fixed by competent state authority, the item is regarded as removed from the field of competition insofar as prices are concerned.

After quoting portions of paragraph 4, AR 5–240, February 11, 1936, the Attorney General continued:

"In our informal discussion of the above quoted regulations before we had an opportunity to inspect the text there was some indication that they were intended to apply only to cases where competition was impracticable because due to State regulations a single potential bidder had been given exclusive franchise or a monopoly in effect. However, upon inspecting other provisions of Army Regulations No. 5–240.4, g, it appears that if subdivision (3) was intended to be limited to such cases it would be mere surplusage. In other words in order to give the subdivision any meaning it would appear to be necessary to construe it as a recognition on the part of the War Department that States, municipalities, and other competent legal authorities are authorized to fix the prices at which commodities and services can be sold to the United States to the same extent that such prices are subject to regulations in transactions between individuals. If this is so, unquestionably it would be most difficult to protect Army milk purchases from State price regulations so long as subdivision (3)

continues in effect. Certainly this Department would be reluctant to bring the injunction suit which you requested in connection with Penn Dairies matter.

"Of course the matter of amending the Regulations is
122 entirely within your jurisdiction and we do not wish to foreclose the question of instituting the injunction action even if such regulations remain in effect, provided of course that there is some logical explanation for subdivision (3) other than the one given above."

3. The pertinent provisions of AR 5-240, February 11, 1936, as changed by Procurement Circular No. 10, July 6, 1938, read as follows:

"1. * * *

"a. The following are not open-market purchases:

"(1) Those made after advertising for bids as prescribed in AR 5-240.

* * * * * * *

"4. Open-market procurement; authorizations.—the statutory requirements for formal advertising may be dispensed with and procurement of supplies made in the open market in the following cases:

* * * * * * *

"g. Competition impracticable—general authorization.—Supplies may be procured without competition only when it is impracticable to secure competition, or when purchase without competition is expressly authorized by statute. In the following cases the supplies or circumstances are such as to make competition impracticable and, therefore, under existing law (par. 2b) purchase may be made in the open market without competition.

"(1) When the articles are purchased from a sole manufacturer or dealer, no suitable similar article being obtainable.

123 "(a) This authority is applicable only when there is but one dealer within a reasonable distance able to furnish the supplies or services or the article has no counterpart in the commercial world.

(b) It is not sufficient to justify the purchase of a particular make of an article under this authority when other makes are available which will accomplish the same result.

(c) Purchases of the following services from the only firm maintaining connection with the station are clearly within this provision: Telephone, telegraph, time, water, electricity, and gas. See (6). (c) below.

* * * * * * *

"(3) When the price is fixed by Federal, State, municipal, or other competent legal authority.

"(a) Where a municipality fixes the price of a commodity or service and no other source of supply is available, purchase in the open market under this authority is applicable.

"(b) The authority fixing the price must be legal. This will not be construed as being applicable in cases where the authority fixing the price is a corporation or an individual. The agency fixing the price must be governmental."

The general statutory authorizations for the foregoing procedure are quoted below:

"All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public
124 exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals." (R. S. 3709; 41 U. S. C. 5.)

"* * * That hereafter, except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the army service shall only be made after advertisement and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered; * * *" (act March 2, 1901 (31 Stat. 905; 10 U. S. C. 1201)).

"Hereafter the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among businessmen, when the aggregate of the amount required does not exceed five hundred dollars; but every such purchase exceeding one hundred dollars shall be promptly reported to the Secretary of War for approval, under such regulations as he may prescribe" (act June 12, 1906 (34 Stat. 258; 10 U. S. C. 1203)).

4. It will be noted that the present inquiry relates to the provisions of regulations dealing with open-market procurement and not with procurement after advertisement. Indicative of the general policy of the War Department in respect of

125 state price-fixing laws is paragraph 11e, AR 5–100, August 7, 1940 (formerly paragraph 11d—renumbered by Procurement Circular No. 9, February 3, 1941), which provides as follows:

"State price-fixing laws.—Appropriated funds may not be used for payments under awards upon invitations for bids containing restrictive requirements of showing compliance with State price-fixing laws relating to services, commodities, or articles necessary to be purchased by the United States until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts. It is not the duty or responsibility of contracting officers of the Federal Government, by means of restrictive specifications, to enforce contractors to comply with the requirements of price-fixing acts of a State. See 16 Comp. Gen. 97, 34g; 17 id. 287; 19 id. 614."

AR5–100, in which the above quoted provision appears, is entitled "Procurement of Supplies; General Provisions." Thus it may be regarded as applicable to the usual purchases made by the War Department. It is only in the case of an open-market purchase, under the exceptional circumstances outlined in the statutes quoted above, that the provisions of paragraph 4, AR 5–240, come into play. Undoubtedly, most of the contracts for the supply of milk for the armed forces are in amounts exceeding $500 and may not be made as open-market purchases except in case of an emergency or where competition is impracticable. Moreover, it should be noted that the heading of paragraph 4g AR–240, reads "Competition impracticable." Therefore, if any policy is to be derived from that paragraph it must be limited, in my

126 view, to cases where there is only one available source of supply. In this connection attention is invited to the first explanatory paragraph (a), under subparagraph 4g (3), where the words "and no other source of supply is available" appear. In view of the foregoing, subparagraph 4g (3) may be explained as an authorization for procurement in the open market, under the exceptional circumstances of impracticability of competition, in order to permit the purchase of needed supplies for the troops despite the possibility of price-fixing by the listed governmental units. Accordingly, it is believed that the quoted interpretation placed upon subparagraph 4g (3) by the Consolidated Milk Producers is untenable when that subparagraph is considered in its context, in the light of the provisions of other Army Regulations and in view of the basic statutes upon which the regulations depend.

5. Furthermore, the War Department has consistently taken and maintained the position that price-fixing measures of the states have no application to procurements by the War Department (JAG 163, Nov. 9, 1935; JAG 434, Sept. 28, 1936; JAG 536, July 14, 1938; JAG 434, Aug. 31, 1938; id. June 26, 1940). Such departmental interpretation of its own regulations over an extended period is entitled to great weight and, in my view, should prevail despite a possible overlapping in the detailed provisions of certain paragraphs of those regulations.

6. However, in view of the suggested interpretation of the regulations in question by the Attorney General and the apparent misapprehension of the War Department's position in this matter by the Consolidated Milk Producers of San Francisco, it is recommended that appropriate changes in these regulations
127 be made to the end that their intended meaning will be clear and that the position of the War Department in the premises will hereafter be accurately reflected. The recommended changes in AR 5–240 are as follows:

Change subparagraph (1), paragraph 4g, to read as follows:

(1) When the supplies are purchased from a sole manufacturer or dealer, no suitable similar supplies being obtainable.

Change subparagraph (1) (a), paragraph 4g, to read as follows:

(a) This authority is applicable only when there is but one dealer within a reasonable distance able to furnish the article or service or the article has no counterpart in the commercial world.

Rescind subparagraph (3), paragraph 4g in its entirety.

In connection with the changes here proposed, attention is invited (a) to the provisions of paragraph 1 (a), AR 5–100, as changed by Procurement Circular No. 10, July 6, 1938, wherein it is provided that the term "supplies" will be considered to include both materials and nonpersonal services and (b) to the provisions of subparagraph (1) (c), paragraph 4g; AR 5–240, February 11, 1936, as changed by Procurement Circular No. 10, July 6, 1938, and set forth in paragraph 3 of this memorandum, which adequately provides for the procurement of utilities where only one source of supply is available.

7. There is submitted herewith draft of reply for the signature of the Under Secretary of War.

ALLEN W. GULLION,
Major General,
The Judge Advocate General.

128 2 Incls.
Incl. 1—Ltr. fr. Asst. Atty. Gen., 4/1/41, w/3 incls.
Incl 2—Drft. ltr. to Atty. Gen.

5. Order amending Army regulations

Proc. Cir. 35

Procurement Circular No. 35

WAR DEPARTMENT,
Washington, May 10, 1941.

Section I

Changes in AR 5-240—

* * * * * *

I—Changes in AR 5-240. * * *

2. Pending the printing of changes in AR 5-240, February 11, 1936, paragraph 4g of those regulations is rescinded and the following substituted therefor:

4g. Competition impracticable—general authorization.—Supplies may be procured without competition only when it is impracticable to secure competition or when purchase without competition is expressly authorized by statute. In the following cases the supplies or circumstances are such as to make competition impracticable, and therefore, under existing law (par. 2b), purchase may be made in the open market without competition.

(1) When the supplies are purchased from a sole manufacturer or dealer, no suitable similar supplies being obtainable.

(a) This authority is applicable only when there is but
129 one dealer within a reasonable distance able to furnish the article or service or the article has no counterpart in the commercial world.

(b) It is not sufficient to justify the purchase of a particular make of an article under this authority when other makes are available which will accomplish the same result.

(c) Purchases of the following services from the only firm maintaining connection with the station are clearly within this provision: Telephone; telegraph, time, water, electricity; and gas. See (5) (c) below.

(d) Purchases of the following are clearly within this provision: Fare on toll bridges, and toll roads, city busses and city railways, river ferries; and pilotage charged.

(2) When the article is patented and for sale only by patentee or his agent at a fixed and uniform price.

(a) Obviously, competitive bidding under this condition would result in no advantage to the Government.

(b) Where two or more articles are capable of producing similar results, it is improper to purchase one without advertising, to the exclusion of the other, even though one or all are patented.

(3) When the articles are parts of apparatus already in use and can only be furnished by one dealer.

(a) Competition in many cases would be impracticable under this condition. Care must be exercised in ascertaining the facts, as parts for many articles may be obtained from other than the original manufacturer of the article. See 7 Comp. Gen. 282.

(b) The foregoing authorization applies only to parts of
130 apparatus already in use and does not authorize the purchase of new apparatus without competition simply because a supply of spare parts of the apparatus is already in stock.

(4) When an emergency exists such that there is no time to obtain competition. See f above.

(A. G. 400.123 (5-3-41).)

By order of the Secretary of War:

G. C. MARSHALL,
Chief of Staff.

Official:

E. S. ADAMS,
Major General,
The Adjutant General.

131 In Superior Court of Pennsylvania

PENN DAIRIES, INC., APPELLANT

v.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

October Term, 1941—No. 311

Assignments of error of Penn Dairies, Inc.

Filed Oct. 29, 1941

Penn Dairies, Inc., the appellant in the above entitled case, assigns as error the following acts of the Court of Common Pleas of Lancaster County from whose decree the above entitled appeal has been prosecuted.

1. The court below erred in affirming the order of the Milk Control Commission as follows:

Order of the Commission.—And now, this 25th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive, is refused for the reasons above stated (56a).

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Penn-

sylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

2. The court below erred in overruling appellant's exception set forth in paragraph 8 of appeal to the Court of Common Pleas, as follows:

Exception 58a).—"The said order is unconstitutional
132 and void and beyond the jurisdiction of the Commission, in that it attempts to interfere with and regulate a contract between appellant and the United States and to prevent performance of said contract, or to penalize appellant for making and performing it."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

3. The court below erred in overruling appellant's exception set forth in paragraph 9 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order is an unlawful and unconstitutional interference with the raising and supporting of the armed forces of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

4. The court below erred in overruling appellant's exception set forth in paragraph 10 of appeal to the Court of Common Pleas, as follows:

133 Exception (58a).—"The said order violates Article I, Section 8 of the Constitution of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

5. The court below erred in overruling appellant's exception set forth in paragraph 11 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order would prevent appellant from carrying on its lawfully established business, and would deprive it of its property and the use thereof without due process of law and contrary to the law of the land, in violation of Amendment XIV of the Constitution of the United States, Article I, Sections 1 and 9 of the Constitution of Pennsylvania."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

134 6. The court below erred in overruling appellant's exception set forth in paragraph 12 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The Commission erred in concluding that the actions of appellant complained of in said citation were in violation of the Commission's Official General Order No. A-6 as amended, and that sale prices under said contract are in violation of any legally established minimum price applicable thereto."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

7. The court below erred in overruling appellant's exception set forth in paragraph 14 of appeal to the Court of Common Pleas, as follows:

Exception (59a).—"The Commission has not established any general order or fixed any minimum re-sale price expressly, or legally or reasonably applicable to sales of milk in such quantities and under such conditions as are involved in said contracts."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's

135 license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

8. The court below erred in overruling appellant's exception set forth in paragraph 17 of appeal to the Court of Common Pleas, as follows:

Exception (59a).—"The Commission erred in ruling that its said General Orders are applicable to sales to the United States or to an instrumentality of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

9. The court below erred in ruling that the Pennsylvania Milk Control Law confers on the Milk Control Commission authority to fix minimum prices for sales of milk to the United States, on issue raised by appellant's answer, as follows:

Answer (14a).—The Commission is without jurisdiction under the laws and constitution of Pennsylvania or under the laws and constitution of the United States to limit, regulate, control or interfere with the prices or other terms of a contract between the respondent and the United States or any agency or instrumentality thereof

136 Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

(Signed) ARNOLD & BRICKER,
By HARRIS C. ARNOLD,
Harris C. Arnold,
Attorneys for Appellant.

[File endorsement omitted.]

137 In Superior Court of Pennsylvania, Philadelphia District

[Title omitted.]

Assignments of error of the United States

Filed Oct. 31, 1941.

On behalf of the United States of America as intervenor appellant, in the above entitled case the following acts are assigned as error on the part of the Court of Common Pleas of Lancaster County, from whose decree the above entitled appeal has been prosecuted.

1. The court below erred in affirming the order of the Milk Control Commission as follows:

Order of the Commission.—And now, this 25th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive, is refused for the reasons above stated (56a).

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

2. The court below erred in denying the second prayer of the suggestion of the interest of the United States, as follows:

Prayer (74a).—"That the court determine and declare that the Commission is without lawful power or authority to fix or regulate the minimum prices which may be charged by milk dealers in making sales of milk and milk products to the
138 United States.

Order of the court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

3. The court below erred in denying the third prayer of the suggestion of the interest of the United States as follows:

Prayer (74a).—"That the court declare the order herein appealed from, by the Penn Dairies, Inc., ineffective, unconstitutional, and void."

Order of the court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvaia, the appellant, is sustained (100a).

4. The court below erred in denying the fourth prayer in the suggestion of the interest of the United States as follows:

Prayer (74a).—"That the court remit said order to the Commission with directions that it be revoked."

Order of the court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

(Signed) GERALD A. GLEESON,
Gerald A. Gleeson,
United States Attorney.
J. BARTON RETTEW, JR.,
J. Barton Rettew, Jr.,
Assistant United States Attorney.

[File endorsement omitted.]

139 In the Superior Court of Pennsylvania

No. 144

[Title omitted.]

Opinion

Filed March 3, 1942

Opinion by KENWORTHEY, J.

The questions are: (1) Whether the Milk Control Law[1] authorizes the Milk Control Commission to fix minimum prices for the sale of milk to the United States; (2) whether there was, on February 15, 1941, any order of the Commission which, when properly construed, applied to such sales; and (3) if these questions are answered in the affirmative, whether the law, and the order issued pursuant to it, cast an unconstitutional burden upon the government.

The facts are virtually undisputed. On February 1, 1941, the government purchasing officer, at Indiantown Gap, sent to
140 various milk dealers, including defendant,[2] invitations to bid on the milk requirements for the Army reservation located there. The requirements called for the delivery of 135,000 one-quart bottles and 440,000 half pint bottles between March 1st and June 30, 1941. On February 4, 1941, the Milk Control Commission promulgated a notice "To All Milk Dealers Interested In Submitting Bids to Furnish Milk to the United States Government at Indiantown Gap," one of which went to defendant. Accompanying the notice, were copies of the orders which the Commission deemed applicable. The notice indicated the minimum price to be $0.095 per bottle for the milk sold in quarts and $0.025 for that sold in half-pints, and the notice closed with a warning that any sales at prices below the prescribed minimums would be construed as violations of the law. The notice, except for the tabulation of specifications, is printed in the margin.[3]

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[1] Act of April 28, 1937, P. L. 417, 31 PS 700j.

[2] Penn Dairies, Inc., for convenience, will be referred to as "defendant" in spite of the fact that Section 904 provides: "The appeal provided by this article from action of the Commission shall be by petition against the Commission, officially as defendant." This case was started by a citation against Penn Dairies, Inc., in which it was the defendant.

[3] "The quantities for the above items are listed as the estimated quantities required for each month during the period from March 1, 1941, to June 30, 1941, inclusive.

"For your information and guidance, we are enclosing herewith a copy of our official General Order A-14, applicable to Area No. 11, the Statewide Milk Marketing Area, in which area Indiantown Gap, Pennsylvania, is located, and direct your attention to subparagraph (b), Section 4, of said Order setting forth the minimum wholesale prices to be charged by or paid to milk dealers for Grade A milk, either raw or pasteurized; for Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content; and for Plain Buttermilk, sold in bottles or other containers, in said Area No. 11.

"The Commission construes the Government Facility at Indiantown Gap, Pennsylvania, as a training camp or reservation, and as such, where milk is required in half-

142 On February 15, 1941, the bids were opened and the contract awarded defendant as the lowest bidder. Defendant's bid for both quantities—$0.079 for the quarts and $0.0215 for the half-pints—was below the minimums.

On March 5, 1941, the Commission issued a citation to defendant to show cause why its application for a milk dealer's license for the year May 1, 1941, to and including April 30, 1942, should not be refused. The sole ground alleged was the aforesaid violation of its Order. Defendant, by answer, raised the questions which are now before this court. The Commission, having refused the license in an order which, on appeal, was sustained by the Court of Common Pleas, defendant took this appeal.

First.—Does the Milk Control Law authorize the Commission to fix minimum prices for milk sold to the government?

The Act, Section 802, provides: "The Commission shall fix * * * the minimum wholesale and retail prices * * * to be charged for milk sold within any milk marketing area of the Commonwealth wheresoever produced, *including* milk sold by: 1. milk dealers to other milk dealers; 2. milk dealers to consumers; 3. milk dealers to stores * * *; 4. stores to consumers * * *." (Italics supplied.) Conceding, arguendo, that the government is not included in any of the enumerated classes, the question is whether "including" is a word of limitation—whether it means "including only." It is sometimes thus used; it is perhaps more

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pint bottles or half-pint paper containers, would be entitled to the special wholesale half pint school prices of said Order No. A-14.

"Where milk dealers propose to furnish Grade A milk, pasteurized Grade B milk, not exceeding 4.0% butterfat content, or Plain Buttermilk meeting Federal Specifications, the following minimum unit prices should be considered in the preparation of their bids:

Product	Unit prices	
	Quarts	Half pints
Grade A milk, either raw or pasteurized	$0.115	$0.035
Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content	.095	.0275
Plain buttermilk	.07	

"Includes service charges for ice, straws, or special boxes. If these services are not rendered, these prices may be reduced by $0.0025 per half pint.

"The Commission suggests that milk dealers acquaint themselves with Federal Specifications for milk, particularly C-M-381 B.

"Any purchases or sales of milk made or offers to buy or sell milk at prices below the prescribed minimum prices of effective Official General Orders of this Commission are construed as violations of the Milk Control Law.

"The Milk Control Commission expects compliance with its orders, rules, and regulations, and will appreciate your cooperation in this matter.

"COMMONWEALTH OF PENNSYLVANIA
MILK CONTROL COMMISSION,
EDWIN H. RIDGWAY, *Secretary*."

often used as a word of extension or enlargement.[4] "To
143 arrive at the real meaning, it is always necessary to take a broad general view of the act, so as to get an exact conception of its aim, scope, and object." Keating v. White et al., 141 Pa. Superior Ct. 495, 504, 15 A. (2d) 396; Statutory Construction Act of May 28, 1937, P. L. 1019, 46 PS 551, 554, 563. The purpose of the law (Sec. 101) is to regulate and control the milk industry "for the protection of the public health and welfare and for the prevention of fraud." Section 801 provides: "The Commission shall base all prices upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer and to the milk dealer." As Mr. Justice Stern said in Rieck-McJunkin Dairy Company v. Milk Control Commission, 341 Pa. 153, 157, 18 A. (2d) 868: "The main purpose of the Milk Control Law [is] to insure a sufficient supply of wholesome milk, which cannot be accomplished unless, as the preamble of the act recites, 'the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk.' * * *." Although the prices to all classes of producers or dealers need not be the same, it is apparent that, in order to carry out the purpose of the law, the price-fixing power must extend to *all* sales of milk by both producers and dealers. If these purposes are carried out, the legislation will inure to the benefit of the government as a part of a community within the Commonwealth, as well as to other consumers. On the other hand, if the policy of the law is not carried out as to the largest single buyer, the purpose may be frus-
144 trated. The Supreme Court has held that the provisions of the law apply to a governmental subdivision of this Commonwealth. Zeuger Milk Co. v. Pittsburgh School District, 334 Pa. 277, 5 A. (2d) 885. We hold that the Legislature intended the Commission to have the power to regulate the prices of sales to the United States, provided it is not unconstitutional.[5] And, in view of this conclusion, it is not necessary to consider whether the government is a "consumer" as defined in the act.

Second.—Had the Commission, on February 15, 1941, issued any order fixing the minimum price of sales to the government for consumption at an army camp?

The Commission contends that the price was fixed by official General Order No. A-6, as amended by A-14.[6] The order pro-

[4] American Surety Co. v. Marotta, 287 U. S. 513, 53 S. Ct. 260; Cannon v. Nicholas, 80 Fed. (2d) 934 (C. C. A. 10th); Weller & Weller v. The Grange Mutual Casualty Insurance Co., 105 Pa. Superior Ct. 547, 161 A. 615; McClathery's Estate, 311 Pa. 351, 166 A. 886.

[5] The Statutory Construction Act of May 28, 1937, P. L. 1019, Article IV, Sec. 52, 46 PS 552, provides that in construing an act, the courts shall presume: "(3) That the Legislature does not intend to violate the Constitution of the United States or of this Commonwealth."

[6] "(B) Minimum Wholesale Prices.—Milk dealers to other milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals and institutions for consumption on the premises:"

vided wholesale prices for sales by "Milk dealers to other
145 milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals and *institutions*. * * *. [Italics supplied.] The price fixed for Grade B milk, not exceeding 4% butterfat, is $0.95 for quarts and $0.25 for half-pints. But there is a special provision for sales to schools, fixing $0.0275 for half-pints. It is to be noted that, for the sales of half-pints, the Commission allowed the lowest price on the schedule. Defendant admits the Indiantown Gap Military Reservation is an institution.[1] Defendant argues that, because of the unprecedented size of the contract—it was conceded to have been the largest single order for milk ever given in this Commonwealth—the cost to it of servicing the contract would be considerably reduced, that it could make a reasonable profit and maintain the price to the producers with a lower return, and that it is, therefore, unreasonable to suppose that the Commission intended the prices in Order A–14 to apply. The principal difficulty with this contention, as we see it, is that the evidence offered does not support it. Defendant offered, by stipulation,[2] figures to show "its average bottle breakage and losses where milk is served under ordinary conditions" as compared to losses from similar causes under the contract, there being an alleged difference of 2%. In the
146 same manner, it offered evidence to show that under "ordinary circumstances delivery of the same quantity of milk would require a large number of trucks and drivers" and that, under the contract, there was a saving of delivery cost on each bottle of $0.0005. But there is nothing to indicate what the "ordinary circumstances" or the "ordinary conditions" were. Obviously, the difference in the cost of servicing a thousand customers is materially larger than the cost of servicing one. But the cost

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" milk	$0.115	$0.06	$0.035
Grade "B" milk:			
Exceeding 4.0% B. F.	.105	.06	.035
Not exceeding 4.0% B. F.	.095	.05	.035
Grade "B" milk to schools not exceeding 4.0% B. F.			.0275
Cream buttermilk, chocolate milk, and other flavored milk or milk drink containing more than 0.5% butterfat	Same as Grade "B" milk exceeding 4.0% butterfat		
Skim milk	.06		
Buttermilk—Plain	.07	.05	.03

(One Gallon, Single Container, Single Delivery, $0.25.)"

[1] The citation averred: "6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training," and this averment was admitted in the corresponding paragraph of the answer.

[2] The stipulation was in two parts. It provided that paragraphs 1, 2, and 3, which have no application to the present question, "shall be treated as admitted facts." It then provided: "It is further agreed that the statements in the following paragraphs shall be received in evidence as competent testimony * * *." Although the statements in these subsequent paragraphs were not contradicted, they were obviously intended to have less weight than those in the first three and we consider that they were open to analysis and that we are not bound by the inferences defendant would draw from them.

of servicing five or ten customers may not be. The schedule of prices fixed by the Commission for this contract, being the lowest possible, the cost must be compared, if the comparison is to be used as valid argument, with the cost of servicing other *large* customers, such as hotels, restaurants, hospitals and other large institutions. If the figure offered by defendant for comparison was weighted by the cost of servicing small individual customers, the figure is of no value whatsoever. And there is no indication of what, exactly, the comparison means. We hold General Order A-1, as amended by A-14, covered the sale to the government.

Third.—Does the Order impose an unconstitutional burden upon the government?

The extent to which, under our dual system of government, the states may burden the operations of the federal government has long been the subject of controversy. The Constitution does not expressly deal with it. From McCulloch v. Maryland,[9] decided in 1824, down to James v. Dravo Construction Co.,[10] de-
147 cided in 1937, Chief Justice Marshall's dictum that the power to tax is the power to destroy was the prevailing doctrine. Under it, any law which imposed a demonstrable burden on the government was held to be unconstitutional.[11] But, as Mr. Justice Holmes pointed out in his dissent in the Panhandle Oil Case,[12] "In those days it was not recognized, as it is today, that most of the distinctions of the law are distinctions of degree," and, "The power to tax is not the power to destroy while this court sits."[13] And the decisions in Graves v. O'Keefe[14] and Alabama v. King & Boozer[15] have swept the doctrine into oblivion. In its place, a new test has arisen. "Since two governments have authority within the same territory, neither, through its power to tax, can be allowed to cripple the operations of the other. Therefore, state and federal governments must avoid exactions which *discriminate* against each other or *obviously interfere* with one another's operations."[16] [Italics sup-
148 plied.] Or, as Mr. Justice Roberts put it in his dissent in James v. Dravo, supra, a tax is valid if it bears upon an independent contractor, does not discriminate, and is not so burdensome as seriously to *interfere* with governmental functions.[17]

[9] Wheat. 316.
[10] 302 U. S. 134.
[11] See statement of Mr. Justice Roberts (dissenting) in James v. Dravo Construction Co., supra, at page 164.
[12] Panhandle Oil Company v. Miss. ex rel. Knox, 277 U. S. 218, 223.
[13] In his concurring opinion in Graves v. New York ex rel. O'Keefe, 306 U. S. 466, Mr. Justice Frankfurter characterized the dictum as a "seductive cliché."
[14] 306 U. S. 466.
[15] — U. S. —, 62 S. Ct. 43. In this case a contractor erected an army camp under a cost-plus contract and the court upheld a tax on the sale of materials which was, therefore, ultimately paid by the United States. In a companion case, a "use" tax was also upheld. Curry v. United States, — U. S. —, 62 S. Ct. 48.
[16] Mr. Justice Frankfurter in Graves v. New York ex rel. O'Keefe, supra, at page 488.
[17] He also points out (p. 172) in this dissenting opinion that the Solicitor General (now Mr. Justice Reed) filed a Brief advocating that "A nondiscriminating state tax

The Milk Control Law is not directed against the Indiantown Gap Reservation. If the objects of the law are realized, the Reservation will benefit in common with the community in general. Conversely, as already pointed out, if dealers are to be free to ignore the law in dealing with the Reservation, the whole plan will suffer proportionately. The Reservation can buy milk as others buy milk and at any price which competition may fix, not lower than the established minimum. There is no burden upon it which does not likewise fall upon all users of milk, including institutions of this Commonwealth. See Zeuger Milk Co., v. Pittsburgh School District, supra. No attempt is made in the law or in the Order of the Board to give any order or direction to the Reservation or its officers. The incidence of the law is upon dealers of milk. Although enforcement of the law against such dealers affects the price of milk to the Reservation as to others, yet that result is in its nature incidental. See Milk Control Board v. Gossello's Dairy Co., 301 Mass. 174, 16 N. E. (2d) 641, 643. Other statutes regulating the quality and 149 providing for the inspection of milk are of similar effect.

All safety and health laws, of which the Wage Law [18] is an example, increase prices. And since the King & Boozer Case, supra, such laws are not deemed invalid, even though the increased cost is directly passed on to the government.

That the test of constitutionality in cases involving police regulations is the same as in tax cases seems clear and is apparently conceded on all sides. Baltimore & Annapolis R. R. v. Lichtenberg, 176 Md. 383, 4 A. (2d) 734, appeal dismissed, 308 U. S. 525, 60 S. Ct. 297; also, Stewart & Co. v. Sadrakula, 309 U. S. 94. A tax on materials, to be added to cost and passed on to the government, imposes a burden no less direct than that imposed by a statute which fixes the minimum price to be charged by an independent contractor selling milk to the government. The government is, by the law, compelled to pay a demonstrably higher price in both instances. And we hold that, since the prices fixed are in no way discriminatory and are not such a burden as to interfere with the functioning of the federal government, they are valid. As Mr. Justice Holmes said, "* * * when the government comes into a state to purchase, I do not perceive why it should be entitled to stand differently from any other purchaser." [19] In the absence of prohibitive federal legislation, we are unwilling to disturb an enactment so well designed to provide for a local need.

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is to be judged not by the 'burden' it imposes, but by the extent of its 'interference' with 'the functioning of government.' Although Mr. Justice Roberts did not subscribe to the new test, it is interesting to note that he did not dissent in either Graves v. New York ex rel. O'Keefe, nor in the King & Booker Case.

[18] Act of 1937, May 27, P. L. 917; 43 PS 331.

[19] Panhandle Oil Case, at p. 224.

Nor do we think the law interferes with the government's policy of competitive bidding. Spahn v. Stewart, 268 Ky. 97, 103
150 S. W. (2d) 651. The applicable statutes (U. S. Revised Statutes, Sec. 3709, 41 U. S. C. A. Sec. 5; 10 U. S. C. A. Secs. 1200 and 1201) provides merely that contracts for the purchase of supplies for the government shall be made after public notice and shall be awarded to the "lowest responsible bidder for the best and most suitable article." As pointed out in United States v. Brookridge Farm, Inc., 111 F. (2d) 461, 463 (C. C. A. 10th), "The purpose of these statutes and regulations is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." The Milk Control Law contravenes neither the language of the statutes nor any of the above stated purposes. It does no more than put all bidders on an equal footing with regard to the minimum price and as we have already pointed out, its primary purpose is to assure *responsibility* with all that the word implies.

In No. 314 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant. In No. 3 October Term, 1942, the appeal of the United States, which intervened in the court below in the case represented by the appeal to No. 314 October Term, 1941, is dismissed.

Rhodes, J., dissents.

[File endorsement omitted.]

[Title omitted.]

151 In the Superior Court of Pennsylvania

Dissenting opinion

Filed March 3, 1942

RHODES, J.

I would reverse the order of the court below. Penn Dairies, Inc., the appellant, at the invitation of the Quartermaster of the United States Army, submitted a bid for furnishing bottled milk to the army at Indiantown Gap, Pa., for the months of March, April, and May 1941. As low bidder appellant was awarded the contract to supply by daily deliveries, during such period, 540,000 half-pint bottles, and 135,000 quart bottles of milk. The only ground for this action was the alleged violation of the commission's minimum price schedules in its general order No. A-14. There is a stipulation as to facts and evidence. Paragraphs 1, 2, and 3 of the stipulation relate to admitted facts, and paragraphs 4, 5, 6, 7, 8, and 9 state what shall be considered as evidence of respondent (appellant here). In my opinion, this

distinction is not especially material in this proceeding. There was no contradictory evidence. It seems too manifest to admit of any argument that if the commission's minimum price order applies in this case there could have been, as a matter of fact, no real competitive bidding. That was required in this case by acts of Congress. 41 U. S. C. A. § 5; 10 U. S. C. A. §§ 1191–
152 1225. It does not appear to have been within any exception to the requirement. Paragraphs 8 and 9 of the stipulation read:

"8. The profit which respondent [appellant here] would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry.

"9. The margin of profit which the respondent [appellant here] will realize under the said contract is adequate for respondent's purposes and to maintain stability in the industry."

A minimum price materially in excess of that necessary to afford stability to the milk industry and to give a reasonable margin of profit to the dealer would certainly eliminate competitive bidding. No one will believe that any responsible dealer who was capable of complying with the contract would bid, as a practical matter, above the fixed minimum. All responsible bids would be at the fixed minimum, and consequently the effect of the commission's minimum price order would be to prevent the free competition which the market would warrant for such a quantity of milk.

For the disposition of this appeal, I do not consider it necessary to decide the constitutional questions which have been raised, or determine the power of the commission as applied to the facts in this case. It is sufficient to refer to the conclusion, which I think is erroneous, in the majority opinion that the commission, on February 15, 1941, had issued an order which applied to this sale to the United States Government. I agree with appellant's argument that the commission's general order contains no schedule which can properly be applied to this contract; that such a contract was not contemplated when the general order was formulated; and
153 that the effort of the commission to apply schedules intended for widely different situations is arbitrary, unreasonable, and unjustified. The stipulation entered into between the parties recited in considerable detail the saving to appellant in performing its contract with the United States Government made possible by the quantity of milk to be delivered.[1] The majority opinion attacks this stipulation on the ground that it is indefinite, and finds difficulty in interpreting the terms, "ordinary circumstances," and "ordinary conditions." I think the meaning is clear for the purposes of this controversy; and what was meant does not appear

[1] See stipulated and admitted facts (28a, 29a).

to be disputed by the commission. The terms were intended to designate the usual course of appellant's business with reference to all its other sales of milk. It was agreed in the stipulation that this was "the largest quantity of milk to be delivered by a single seller to a single purchaser, or for delivery in quantity lots, known to the respondent or to the commission." The suggestion in the majority opinion that under the circumstances a more useful comparison could have been made with "the cost of servicing other *large* consumers, such as hotels, restaurants, hospitals and other large institutions" is not convincing, and I think it is inapplicable. No milk contract of this magnitude has been known in Pennsylvania before. Appellant therefore drew a comparison with all of the remainder of its business, the subject matter of the commission's ordinary exercise of its authority, to demonstrate the conclusion which the commission in the stipulation conceded thus: "The profit which respondent would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry." No producer would benefit from such excessive profits to the
154 dealer. In my opinion, the commission's general order No. A-14 does not cover this contract,[2] and was not intended to apply to the situation involved in this case, and the proper construction of that order makes it inapplicable to the facts which have been stipulated.

The commission's argument that if its order did not apply to the present transaction because the transaction was not described in the order then appellant should have applied to the commission as to applicable prices raises a matter which is not here involved. If there was no applicable schedule, there was no violation by appellant of the order as charged.

I would therefore reverse the order of the court below in sustaining the commission's refusal of the application for renewal of appellant's license.

[File endorsement omitted.]

155 In the Supreme Court of Pennsylvania, Eastern District

[Title omitted.]

Assignments of error of Penn Dairies, Inc.

Filed April 18, 1942

And now, April 15, 1942, Penn Dairies, appellant, by Owen P. Bricker and Harris C. Arnold, its attorneys, assigns as error the following actions of the Superior Court:

[2] This sale and purchase of milk by the Government of the United States for consumption by the Army is not within the commission's order No. A-14 establishing minimum wholesale prices "to bakeries, hotels, restaurants, hospitals, and institutions for consumption on the premises," and to schools.

1. The Superior Court erred in overruling appellants first assignment of error in that court as follows:

1. The court below erred in affirming the order of the Milk Control Commission as follows:

Order of the Commission.—And now, this 25th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive, is refused for the reasons above stated (56a).

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of
156 Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

2. The Superior Court erred in overruling appellant's second assignment of error in that court, as follows:

2. The court below erred in overruling appellant's exception set forth in paragraph 8 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order is unconstitutional and void and beyond the jurisdiction of the Commission, in that it attempts to interfere with and regulate a contract between appellant and the United States and to prevent performance of said contract, or to penalize appellant for making and performing it."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

157 Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

3. The Superior Court erred in overruling appellant's third assignment of error in that court, as follows:

3. The court below erred in overruling appellant's exception set forth in paragraph 9 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order is an unlawful and unconstitutional interference with the raising and supporting of the armed forces of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

158 4. The Superior Court erred in overruling appellant's fourth assignment of error in that court, as follows:

4. The court below erred in overruling appellant's exception set forth in paragraph 10 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order violates Article I, Section 8 of the Constitution of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

5. The Superior Court erred in overruling appellant's fifth assignment of error in that court, as follows:

5. The court below erred in overruling appellant's exception set forth in paragraph 11 of appeal to the Court of Common Pleas, as follows:

159 Exception (58a).—"The said order would prevent appellant from carrying on its lawfully established business, and would deprive it of its property and the use thereof without due process of law and contrary to the law of the land, in violation of Amendment XIV of the Constitution of the United States, Article I, Sections 1 and 9 of the Constitution of Pennsylvania."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

6. The Superior Court erred in overruling appellant's sixth assignment of error in that court, as follows:

6. The court below erred in overruling appellant's exception set forth in paragraph 12 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The Commission erred in concluding that the actions of appellant complained of in said citation were
160 in violation of the Commission's Official General Order No. A-6 as amended, and that sale prices under said contract are in violation of any legally established minimum price applicable thereto."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

7. The Superior Court erred in overruling appellant's seventh assignment of error in that court, as follows:

7. The court below erred in overruling appellant's exception set forth in paragraph 14 of appeal to the Court of Common Pleas, as follows:

Exception (59a).—"The Commission has not established any general order or fixed any minimum re-sale price expressly, or legally or reasonably applicable to sales of milk in such quantities and under such conditions as are involved in said contract."

161 Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

8. The Superior Court erred in overruling appellant's eighth assignment of error in that court, as follows:

8. The court below erred in overruling appellant's exception set forth in paragraph 17 of appeal to the Court of Common Pleas, as follows:

Exception (59a).—"The Commission erred in ruling that its said General Orders are applicable to sales to the United States or to an instrumentality of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

162 Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

9. The Superior Court erred in overruling appellant's ninth assignment of error in that court, as follows:

9. The court below erred in ruling that the Pennsylvania Milk Control Law confers on the Milk Control Commission authority to fix minimum prices for sales of milk to the United States, on issue raised by appellant's answer, as follows:

Answer (14a).—The Commission is without jurisdiction under the laws and constitution of Pennsylvania or under the laws and constitution of the United States to limit, regulate, control or interfere with the prices or other terms of a contract between the respondent and the United States or any agency or instrumentality thereof.

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 163 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

10. The Superior Court erred in entering the following order: In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

(Signed) Arnold & Bricker.
By Harris C. Arnold.
Harris C. Arnold.
Attorneys for Appellant.

[File endorsement omitted.]

164 In the Supreme Court of Pennsylvania

[Title omitted.]

Assignments of error of the United States

Filed Apr. 17, 1942

And now, April 15, 1942, the United States of America, Appellant, Intervenor, by Gerald A. Gleeson, United States Attorney, and J. Barton Kettew, Jr., Assistant United States Attorney for the Eastern District of Pennsylvania, its attorneys, assigns as error the following actions of the Superior Court:

1. The Superior Court erred in overruling the appellant's First Assignment of Error in that Court, as follows:

The court below erred in affirming the order of the Milk Control Commission as follows:

Order of the Commission.—And now, this 25th day of March, A. D. 1941, the application of Penn Daries, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's License for the year May 1, 1941 to April 30, 1942 inclusive, is refused

for the reasons above stated (56a).

165 Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the Appellant, is sustained (100a).

Order of the Court.—In No. 3 October Term, 1942, the appeal of the United States which intervened in the court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

2. The Superior Court erred in overruling the appellant's Second Assignment of Error in that Court, as follows:

The court below erred in denying the second prayer of the suggestion of the interest of the United States, as follows:

Prayer (74a).—"That the court determine and declare that the Commission is without lawful power or authority to fix or regulate the minimum prices which may be charged by milk dealers in making sales of milk and milk products to the United States."

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's

166 license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Court.—In No. 3 October Term, 1942, the appeal of the United States which intervened in the Court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

3. The Superior Court erred in overruling the appellant's Third Assignment of Error in that Court, as follows:

The court below erred in denying the third prayer of the suggestion of the interest of the United States as follows:

Prayer (74a).—"That the court declare the order herein appealed from, by the Penn Dairies, Inc., ineffective, unconstitutional and void."

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Court.—In No. 3 October Term, 1942, the appeal of the United States which intervened in the court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

167 4. The Superior Court erred in overruling the appellant's Fourth Assignment of Error in that Court, as follows:

The court below erred in denying the fourth prayer in the suggestion of the interest of the United States as follows:

Prayer (74a).—"That the court remit said order to the Commission with directions that it be revoked."

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Court.—In No. 3 October Term, 1942, the appeal of the United States which intervened in the court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

5. The Superior Court erred in overruling the appellant's Fifth Assignment of Error in that Court, as follows:

In entering the following Order: In No. 3 October Term, 1942, the appeal of the United States which intervened in

168 the Court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

(Signed) GERALD A. GLEESON,
Gerald A. Gleeson,
United States Attorney.
J. BARTON RETTEW, JR.
J. Barton Rettew, Jr.,
Assistant United States Attorney.

[File endorsement omitted.]

169 In the Supreme Court of Pennsylvania,
Eastern District

[Title omitted.]

Opinion of the Court

Filed May 25, 1942

Per Curiam:

These appeals are from the judgments of the Superior Court, which affirmed an order of the Court of Common Pleas of Lancaster County. We have carefully considered each question raised and find that they were all correctly and ably disposed of by the learned Superior Court. It would be idle repetition to restate the facts and law of the case. We therefore affirm the judgments on the comprehensive opinion of Judge Kenworthey, reported in — Pa. Superior Ct. —.

Judgements affirmed.

[File endorsement omitted.]

170 In the Supreme Court of Pennsylvania,
Eastern District

[Title omitted.]

Petition for allowance of appeal

Filed July 27, 1942

The United States of America and Penn Dairies, Inc., petitioners herein, respectfully state that on May 25, 1942 this Court entered judgment against them affirming the judgment of the Superior Court.

Petitioners, believing that the judgment of this Court is incorrect, pray that they may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of this

Court and that a transcript of the Record in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioners submit and present to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

THE UNITED STATES OF AMERICA,
By CHARLES FAHY, *Solicitor General.*
GERALD A. GLEESON,
United States Attorney.

PENN DAIRIES, INC.
By HARRIS C. ARNOLD, *Attorney.*

Dated 17 July 1942.

171 [File endorsement omitted.]

224 In the Supreme Court of Pennsylvania

[Title omitted.]

Order allowing appeal

Filed Aug. 8, 1942

And now, August 8th, 1942, it is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above-entitled case, as provided by law, and it is further ordered that the Prothonotary of the Supreme Court of Pennsylvania shall prepare a certified transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

And it is further ordered that security for costs on appeal and to act as a supersedeas be fixed in the sum of $500.00.

WM. I. SCHAFFER,
Chief Justice of the
Supreme Court of Pennsylvania.

[File endorsement omitted.]

225 In the Supreme Court of Pennsylvania

[Title omitted.]

Assignment of errors

Filed July 27, 1942

The Court erred.

1. In holding that the Pennsylvania Milk Control law (Act of April 28, 1937, P. L. 417) is constitutional in so far as it

authorized the Pennsylvania Milk Control Commission to fix minimum prices for sales of milk in Pennsylvania to the United States.

2. In holding that General Order No. A-14 of the Pennsylvania Milk Commission is constitutional in so far as it prescribes minimum prices for sales of milk in Pennsylvania to the United States.

3. In holding that the Pennsylvania Milk Control Commission may constitutionally fix a minimum price below which a milk dealer in Pennsylvania may not sell or contract to sell milk to the United States.

4. In failing to hold that the Act and Order contravened Article 1, Section 8 of the Constitution of the United States because they constitute a direct interference with the procurement of supplies by the United States Army.

5. In failing to hold that the Act and Order are unconstitutional because, contrary to Article 6 of the Constitution of
226 the United States, they interfere and conflict with the competitive bidding statutes of the United States. R. S. 3709 (41 U. S. C. 5); Act of July 5, 1884, c. 217, 22 Stat. 108; 109; Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U. S. C. 1200–1201).

6. In failing to hold that the Act and Order are unconstitutional because they constitute an attempt on the part of the State to exercise supervision and control over the contracts of the United States.

7. In failing to hold that the Act and Order are unconstitutional because they attempt to regulate the terms upon which the United States may contract with its own citizens.

8. In failing to hold that the Act and Order are unconstitutional because they deprive Penn Dairies, Inc., of its license without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

9. In affirming the judgment of the Superior Court of Pennsylvania.

(Signed) THE UNITED STATES OF AMERICA,
By CHARLES FAHY,
Solicitor General.
GERALD A. GLEESON,
United States Attorney.
PENN DAIRIES, INC.
By HARRIS C. ARNOLD,
Harris C. Arnold.

[File endorsement omitted.]

228 [Citation in usual form showing service on Frank E. Coho, omitted in printing.]

229 In the Supreme Court of Pennsylvania

Designation of record

Filed Aug. 18, 1942

To Honorable CHARLES A. WATERS,
Prothonotary of the Supreme Court of Pennsylvania:

On appeal of the United States of America and Penn Dairies, Inc. to the Supreme Court of the United States, in the above cases, you will incorporate in the transcript, the following portions of the record:

1. The Record as printed and used at argument in the Supreme Court of Pennsylvania in Nos. 173 and 180, January Term, 1942.
2. Assignments of Error in the Superior Court, No. 311, October Term, 1941 and No. 3 October Term, 1942.
3. All Opinions in the Superior Court.
4. Docket Entries Supreme Court of Pennsylvania in Nos. 173 and 180 January Term, 1942.
5. All Assignments of Error in Supreme Court of Pennsylvania (both cases).
6. Opinion of the Supreme Court (both cases—one opinion).

230 7. Petition for and allowance of Appeal to the Supreme Court of the United States and jurisdictional statement.

8. Assignments of Error on Appeal to the Supreme Court of the United States.
9. This Praecipe.

THE UNITED STATES OF AMERICA,
By GERALD A. GLEESON,
United States Attorney.
HARRIS C. ARNOLD.

AUGUST 13, 1942.

On behalf of the appellee, I hereby accept service of the foregoing praecipe.

(Signed) FRANK E. COHO,
Deputy Attorney General of Pennsylvania
of counsel for Milk Control Commission
of Pennsylvania, appellee.

[File endorsement omitted.]

231 [Bond on Appeal for $500.00 approved and filed Aug. 8, 1942; omitted in printing.]

241 [Clerk's certificate to foregoing transcript omitted in printing.]

242 [Chief Justice's certificate to Clerk omitted in printing.]

[Clerk's certificate to Chief Justice, omitted in printing.]

243 In the Supreme Court of the United States,
October Term, 1942

[Title omitted.]

Statement of points relied upon and designation of record for printing

Filed Oct. 7, 1942

Pursuant to rule 13, paragraph 9 of this Court, the appellants state that they intend to rely on all of the points in their assignments of errors.

The appellants deem the entire record, as filed in the above entitled cause, with the exception of the material contained in pages 109 to 117 of the transcript of record, necessary for the consideration of the points relied upon.

THE UNITED STATES OF AMERICA,
By CHARLES FAHY,
Charles Fahy,
Solicitor General.

PENN DAIRIES, INC.
By HARRIS C. ARNOLD,
Harris C. Arnold,
Attorney.

247 Supreme Court of the United States

[Title omitted.]

Order noting probable jurisdiction

October 26, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is assigned for argument immediately following No. 278.

[Endorsement on cover:] File No. 46900. Pennsylvania, Supreme Court. Term No. 399. Penn Dairies, Inc., and The United States of America, Appellants vs. The Milk Control Commission of the Commonwealth of Pennsylvania. Filed September 15, 1942. Term No. 399 O. T. 1942.

U. S. GOVERNMENT PRINTING OFFICE 1942